TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 257

H. K. PORTER COMPANY, INC., ET AL.,
APPELLANTS,

vs.

CENTRAL VERMONT RAILWAY, INC., ET AL.

No. 258

INTERSTATE COMMERCE COMMISSION,
APPELLANT,

vs.

CENTRAL VERMONT RAILWAY, INC., ET AL.

No. 266

UNITED STATES, APPELLANT,

vs.

CENTRAL VERMONT RAILWAY, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

FILED 257—JULY 22, 1960
FILED 258—JULY 22, 1960
FILED 266—JULY 25, 1960
PROBABLE JURISDICTION NOTED OCTOBER 17, 1960

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APPELLANTS,

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INTERSTATE COMMERCE COMMISSION,
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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

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[fol. A]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., et al., Plaintiffs,

against

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT—Filed March 12, 1959

(Equitable Relief Sought)

[fol. 1] I.

The plaintiffs herein bring this complaint against the United States of America and the Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside and annulling certain reports and orders, more particularly hereinafter described, issued by the Interstate Commerce Commission (hereinafter sometimes referred to as the "Commission") dated May 7, 1958 and February 19, 1959, in a proceeding before the Commission known as Docket No. 30846, *Thermoid Company, Southern Division* v. *Baltimore & Ohio Railroad Company, et al.*, said proceeding embracing also Docket No. 31683, *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*; Docket No. 31684, *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*; Docket No. 31685, *Union Asbestos and Rubber Company* v. *The Baltimore* [fol. 2] *and Ohio Railroad Company, et al.*, and Docket No. 31686, *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*

II.

Plaintiff, Central Vermont Railway, Inc., is a railroad corporation organized and existing under and by virtue of the laws of the State of Vermont, with its principal office and place of business in St. Albans, Vermont. It is a common carrier engaged in the transportation of property and passengers in interstate commerce subject to the provisions of the Interstate Commerce Act, as amended, in and through the states of Vermont, Massachusetts, and Connecticut. The names of all the plaintiffs herein, each of which was a defendant in the proceedings before the Interstate Commerce Commission, are set forth in Appendix A annexed hereto and made a part hereof.

III.

This action is brought under the United States is made a defendant herein, and the jurisdiction of this court is conferred by, United States Code, Title 28, Sections 1336, 2321 through 2325, inclusive.

IV.

The venue of this action is in this court pursuant to the provisions of United States Code, Title 28, Section 1398, referred to above, because the orders of the Commission sought to be suspended, enjoined, set aside and annulled, require the plaintiffs herein, including Central Vermont Railway, Inc., which is incorporated in the State of Vermont and maintains its principal office in the City of St. Albans, State of Vermont, within the jurisdiction of this court, to publish, maintain and apply to the trans-[fol. 3] portation of crude asbestos, asbestos fibre, and asbestos refuse, shorts and waste, in carloads, originating at certain points within the Province of Quebec, Canada, and moving to certain destinations in North and South Carolina, rates, regulations and practices which will prevent and avoid alleged undue prejudice and preference said to be violative of Section 3 of the Interstate Commerce Act.

V.

The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce, approved February 4, 1887, 24 Stat. 383, and amendments thereto, commonly known as the Interstate Commerce Act, as amended, with specifically vested powers and duties respecting interstate and foreign commerce under said Interstate Commerce Act, 49 U.S.C. 1, *et seq.*, and the various acts amendatory thereof and supplemental thereto.

VI.

The aforesaid proceedings before the Commission, in which the reports and orders herein complained of were made, and which reports and orders plaintiffs herein (defendants before the Commission) seek to have suspended, enjoined, set-aside and annulled, embrace five complaints, the first having been previously considered in Docket No. 30846, *Thermoid Company, Southern Division* v. *Baltimore & O. R. Co.*, 288 I.C.C. 793, by Division 3, decided May 25, 1953, but subsequently reopened for further hearing. The other four complaints were filed after the initial Commission report on the first complaint.

VII.

The complaint filed on behalf of *Thermoid Company, Southern Division* v. *Baltimore & Ohio Railroad Company,* [fol. 4] *et al.* (Docket No. 30846), assails combination rates and charges applicable on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., to Charlotte, N. C. It alleges that those rates were and are unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly and unjustly preferential of manufacturers located at Chicago and Waukegan, Ill., and Milwaukee, Wisc., and prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act. The prayer of the complaint is that plaintiffs herein be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and

asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., Canada, to Charlotte, N. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof. Copy of that complaint is reproduced as Appendix B, attached hereto and made a part hereof.

VIII.

Following a hearing on the aforesaid complaint, Examiner J. Edgar Snider submitted a proposed report which noted that the assailed rates were combination rates applicable to and from Newport, Vt., a port of entry to the United States on or adjacent to the Canadian border. That report, which is reproduced as Appendix C, attached hereto and made a part hereof, reads in part as follows:

> "Under Section 1 of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable [fol. 5] for those rates only, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.
>
> "So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction.
>
> "The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed."

The report of the Commission, by Division 3, 288 I.C.C. 793, which is reproduced as Appendix D, attached hereto and made a part hereof, stated in part as follows:

> "Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte."

[fol. 6] The Commission found that:

> "the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered."

IX.

By petition dated July 31, 1953, plaintiffs herein sought the reopening and reconsideration of the aforesaid proceeding. This petition was granted by order of the Commission dated April 5, 1954.

By petition dated May 17, 1954, the complainant sought "the further reopening of this proceeding for the purpose of rehearing and further hearing". This petition was granted by order of the Commission dated July 30, 1954.

X.

On certain dates thereafter, i.e., December 6 and December 13, 1954, four additional complaints were filed with the Commission on behalf of Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division (Docket No. 31683), Thermoid Company, Southern Division (Docket No. 31684), Union Asbestos and Rubber Company (Docket No. 31685), and Carolina Asbestos Company (Docket No. 31686), which collectively assail combination rates applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, Province of Quebec, to Charlotte, Marshville and Davidson, N. C., and North Charleston, S. C. Those rates are alleged to be [fol. 7] unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial, in violation of Section 3 thereof. The complaint in Docket No. 31686 in addition alleges that combination rates applicable on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson, N. C., are unlawful in like respects. The prayer of each of these four complaints is that the plaintiffs herein be required to establish just and reasonable rates for future application from the specified Canadian origins to the specified destinations in North and South Carolina. Each of the said complaints, except the complaint in Docket No. 31684, also prays that reparation be awarded on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof. Those complaints are respectively reproduced as Appendices E, F, G and H, attached hereto and made a part hereof.

XI.

The five complaints aforementioned were heard (reheard or further heard in the case of the complaint in Docket No. 30846) on a consolidated record before an Examiner. Following the issuance of a proposed report by the examiner, exceptions thereto were filed by plaintiffs herein, and oral argument was held before the entire Commission. On May 7, 1958, the Commission issued a report and order,

which have been reproduced as Appendices I and J, respectively, attached hereto and made a part hereof.

XII.

In the said report of the Commission, with Chairman Freas dissenting and Commissioners Mitchell and Goff not participating (officially reported in 303 I.C.C. at page 743), it was found (p. 755) that the assailed rates "insofar as the [fol. 8] transportation took or takes place within the United States" were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, the specific rates set forth therein to the considered destinations.

It was further found (p. 756) that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, "insofar as the transportation takes place within the United States", are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory* to the extent that the rates to the considered destinations exceed or may exceed the rates applying from the same origins in Canada to Ambler, Pa., and other destinations in Official Territory taking the same rates, by the specific amounts set forth therein.

It was further found (p. 756) that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts, and

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* Official territory was defined by the Commission in *Southern Class Rate Investigation*, 100 I.C.C. 513, 518, as

"Official territory, as the term is used in this report is roughly the territory east of the Mississippi River and north of southern territory (South of the Ohio River and south of the line of the Norfolk & Western from Bristol, Tenn.-Va., to Norfolk, Va., not including the eastern corner of Kentucky served by the Chesapeake & Ohio), including the lower peninsula of Michigan and a small strip of southern Wisconsin. It is the territory in which freight rates are governed by the official classification, and is divided, from west to east, into central territory, the Buffalo-Pittsburgh zone, trunk line territory and New England territory." (Material in parentheses supplied.)

waste, from Danville, St. Malachie, and Warwick, "insofar as the transportation takes place within the United States", are and will be unduly prejudicial to the complainants and unduly preferential of complainants' com-[fol. 9] petitors in Official Territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

It was further found (p. 756) that the complainants in Dockets Nos. 30846, 31683, 31685 and 31686 were damaged and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the basis therein found to have been just and reasonable.

XIII.

The report of the Commission does not set forth the measure of the assailed rates or the measure of the allegedly preferential rates in so far as transportation thereunder took or takes place within the United States, nor does it set forth the extent to which the preference found and stated in cents relates to and covers transportation within the United States.

XIV.

The record made in the proceedings before the Commission contains no evidence tending to show the measure of the assailed rates or the allegedly preferential rates "insofar as the transportation took or takes place within the United States".

XV.

None of the complaints in the proceedings before the Commission alleges that the assailed rates were and are unlawful only in so far as transportation thereunder took or takes place within the United States.

[fol. 10]

XVI.

The order of the Commission, dated May 7, 1958, refers to the report dated the same day, and that report and the prior report in Docket No. 30846, 288 I.C.C. 793, are made a part thereof. The said order directs the defendants named in the five complaints to cease and desist, on or before August 14, 1958, and thereafter to abstain from, practicing the alleged undue prejudice and preference referred to in the report. It further directs the defendants named in the five complaints to establish, on or before August 14, 1958, upon notice to the Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under Section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the alleged undue prejudice and preference referred to therein. The order also vacated and set aside the order of May 25, 1953, in Docket No. 30846.

XVII.

On or about June 13, 1958, the plaintiffs herein filed a petition praying for the reopening of the proceedings for oral argument before and reconsideration by the Commission. That petition is reproduced as Appendix K, attached hereto and made a part hereof. Thereafter, and by orders dated July 2, 1958, July 29, 1958, October 21, 1958, and January 15, 1959, the Commission successively modified the effective date of the aforesaid order of May 7, 1958, to become effective March 26, 1959, upon thirty days' notice.

XVIII.

By order dated December 10, 1958, the Commission denied the said petition for reopening, reargument and re-
[fol. 11] consideration referred to in Paragraph XVII hereof. That order is reproduced as Appendix L, attached hereto and made a part hereof.

XIX.

By order dated February 19, 1959, the Commission further modified the said order of May 7, 1958, so as to

authorize that the action directed therein be effectuated upon not less than ten days' notice. That order is reproduced as Appendix M, attached hereto and made a part hereof.

XX.

On February 20, 1959, the plaintiffs herein filed a petition with the Commission under Section 1.101 of the Commission's General Rules of Practice for leave to file a petition seeking reopening of the proceedings for reconsideration and for vacation of the outstanding orders therein. That petition is reproduced as Appendix N, attached hereto and made a part hereof. At the same time plaintiffs herein also filed with the Commission a petition seeking the reopening of the proceedings for reconsideration and for the vacation of the outstanding orders. That petition is reproduced as Appendix O, attached hereto and made a part hereof. The Commission has not acted on these petitions as of the date of the instant complaint.

XXI.

Plaintiffs herein allege:

1. That the complaints are defective in that they assail combination rates from certain points in the Province of Quebec to certain destinations in the United States, made over United States ports of entry on or adjacent to the international boundary, and thus fail to state a cause of action over which the Commission has jurisdiction.

[fol. 12] 2. That the Commission lacked jurisdiction to entertain said complaints since it has no jurisdiction over combination rates made over ports of entry on or adjacent to the international boundary from points in Canada to points in the United States.

3. That the said order of the Commission dated May 7, 1958, as modified by the order of February 19, 1959, exceeds the statutory power of the Commission, is based upon errors of law, is not supported by evidence or adequate findings, and is unlawful, arbitrary, null and void for the following reasons:

a. The Commission exceeded its statutory power under Section 1(1) of the Interstate Commerce Act in assuming jurisdiction over common carriers engaged in transportation of property within a foreign country.

b. The Commission exceeded its statutory power under Section 1(2) of the Interstate Commerce Act in assuming jurisdiction over transportation within a foreign country and over rates and charges applying to such transportation.

c. The Commission exceeded its statutory power under Section 3(1) of the Interstate Commerce Act in promulgating an order which does not give the carriers an actual alternative of increasing the alleged preferential rates.

d. The Commission exceeded its statutory power in prescribing rates without finding that such rates will be just and reasonable as required under Section 15(1) of the Interstate Commerce Act.

e. The Commission exceeded its statutory power under Section 1, paragraphs (1) and (2), in prescribing rates for application to transportation taking place partly within a foreign country.

[fol. 13] f. The Commission failed to make (an essential) basic finding with respect to the measure of the assailed rates in so far as transportation thereunder takes place within the United States to support the ultimate conclusion that the assailed rates "insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of complainants' competitors in Official territory * * * ".

g. The Commission concluded that the assailed rates "insofar as transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of complainants' competitors in Official territory * * * " despite the absence of any evidence in the record showing the measure of the assailed rates in so far as trans-

portation thereunder takes place within the United States.

h. The Commission concluded that the assailed rates "insofar as transportation takes place within the United States, are and will be unduly prejudicial to the complainants * * *" despite the fact that none of the complaints allege that the assailed rates are unlawful only in so far as transportation takes place within the United States.

i. The Commission failed to state and find the measure of the allegedly preferential rates in so far as transportation thereunder took or takes place within the United States, and in failing to show the extent to which the preference found and stated in cents relates to and covers transportation within the United States.

j. The use by the Commission of the modifying clause, "insofar as transportation takes place within the United States", in each of the ultimate findings is arbitrary and baseless, the only apparent purpose of [fol. 14] which is to attempt to circumvent the limitations upon its jurisdiction expressed in Section 1 paragraphs (1) and (2) of the Interstate Commerce Act.

4. That the reports and orders constitute an abuse of the Commission's discretion and thus are unlawful in that the Commission abruptly departs from a settled principle of more than forty years standing which holds that the Commission's jurisdiction attaches at ports of entry or exit on or adjacent to the international boundary, but in less than six months thereafter reasserts and reverts to that principle. See Report on Reconsideration in Docket No. 31990, *Yellow Jacket Boat Company, Inc.* v. *Atchison Topeka & Santa Fe Ry. Co., et al.* (mimeographed), decided October 30, 1958.

5. That the reports and orders constitute an abuse of the Commission's discretion and thus are unlawful in that

the Commission departs from a settled principle of more than forty years standing and applied the charged concept retroactively.

XXII.

Plaintiffs will be irreparably damaged if said reports and orders are not permanently suspended, enjoined, set aside and annulled, and are without an adequate remedy at law.

XXIII.

WHEREFORE, plaintiffs pray:

1. That process may issue against the United States of America and Interstate Commerce Commission;

2. That this Court stay, restrain and suspend the operation of the orders of the Commission dated May 7, 1958, and February 19, 1959, pending the final hearing and determination of this action;

[fol. 15] 3. That a Court constituted as required by U. S. Code, Title 28, Sections 2284, and 2321-2325, consisting of three judges, of whom at least one ~~shall be a Circuit Judge~~, be convened, and that said Court so constituted and convened shall hear this petition upon due and legal notice to defendants;

4. That said Court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside and annulling the said orders of the Commission;

5. That plaintiffs have a recovery of the defendants of the proper costs of this suit; and

6. That the plaintiffs have such other and further relief in the premises as to equity may appertain and as may be deemed by this Court fit and proper.

Respectfully submitted,

Horace H. Powers, Railroad Terminal Building, St. Albans, Vermont, Attorney for Plaintiffs.

Of Counsel:

J. Raymond Hoover, Metropolitan Bank Bldg., Washington 5, D. C.

J. Edgar McDonald, 466 Lexington Avenue, New York 17, N.Y.

William H. Parsons, Colorado Building, Washington 5, D. C.

John F. Reilly, 230 Park Avenue, New York 17, N. Y.

[fol. 16] Verification by J. Edgar McDonald (omitted in printing).

[fol. 17]

APPENDIX A TO COMPLAINT

LIST OF PLAINTIFFS

The Akron, Canton & Youngstown Railroad Compan
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
Canadian Pacific Railway Company.

The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
[fol. 18] Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company
(Canadian National Railway Company, Lessee)
The United States and Canada Rail Road company
(Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
[fol. 19] Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Rail Road Company.
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.
The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company.

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company (Horace Banta, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

[fol. 20] Quebec Central Railway Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation.

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

[fol. 21]

APPENDIX B TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

COMPLAINT

Docket No. 30846

THERMOID COMPANY,
Southern Division

Complainant,

—v.—

The Baltimore and Ohio Railroad Company
Boston and Maine Railroad
Canadian Pacific Railway Company
The Central Railroad Company of New Jersey
The Chesapeake and Ohio Railway Company
The Dalaware and Hudson Railroad Corporation
Napierville Junction Railway Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company
Norfolk Southern Railway Company
The Pennsylvania Railroad Company
Piedmont and Northern Railway Company
Quebec Central Railway Company
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company
Seaboard Air Line Railroad Company
Southern Railway Company

Defendants.

[fol. 22] The complaint of the above complainant respectfully shows:

That Thermoid Company, Southern Division is a corporation under the laws of Delaware, its principal office is located at Trenton, New Jersey, and its asbestos textile manufacturing plant being located at Charlotte, North Carolina. The business of the complainant is that of manufacturing, selling and distributing asbestos textile products. Among other things the complainant purchases asbestos crude and asbestos fibre, at Black Lake, Coleraine and Thetford Mines, P. Q. Canada, drawing the same into Charlotte, North Carolina, via all rail routes, in carload lots, and at Charlotte, North Carolina, manufactures into asbestos textile products and ships to all parts of the United States, including the States of Illinois, Indiana and Michigan.

II

That the defendants are as follows: Baltimore & Ohio Railroad Company; Boston & Maine Railroad; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Chesapeake & Ohio Railway Company; Delaware & Hudson Railroad Corporation; Napierville Junction Railway Company; New York Central Railroad Company; New York, New Haven & Hartford Railroad Company; Norfolk Southern Railway Company; Pennsylvania Railroad Company; Piedmont & Northern Railway Company; Quebec Central Railway Company; Reading Company; Richmond, Fredericksburg and Potomac Railroad Company; Seaboard Air Line Railroad Company; Southern Railway Company; all of whom are common carriers and subject to the Interstate Commerce Act.

III

That complainant's plant was located in Charlotte, North Carolina, in 1919. Its supply of asbestos crude and asbestos [fol. 23] fibre as far as the supply was, and is, available has been purchased at mines located on the Quebec Central Railway, the principal movement originating at Thetford Mines, P. Q. Canada.

IV

That there is attached hereto a statement, identified as Appendix I, which sets out and describes in detail the one

hundred thirty six (136) carload shipments of asbestos crude and asbestos fibre, from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, showing routes over which said shipments moved to Charlotte, North Carolina, the dates of the shipments, the car initials and numbers, the dates on which the charges assessed thereon were paid, the freight bill numbers and dates, the weights based upon which the charges were assessed, the rates at which the charges were assessed, and the freight charges paid thereon.

V

It is alleged that the rates on which the charges were assessed and charges collected for thereon as shown in Appendix I, was, is, and for the future will be unreasonable and unjust, in violation of Section 1 (4) of the Interstate Commerce Act.

In support of this allegation we cite rates to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., shown below:

From:	Rates Asbestos			
	crude		fibre	
Black Lake,)	(1)	120	(1)	92
Coleraine,)	(2)	132	(2)	101
Thetford Mines, P. Q. Canada)	(3)	137	(3)	105

[fol. 24] As compared with rates to Charlotte, N. C. see below:

From:	Rates Asbestos			
	crude		fibre	
Black Lake,)	(1)	158	(1)	121
Coleraine,)	(2)	174	(2)	134
Thetford Mines, P. Q. Canada)	(3)	178	(3)	137

(1) Rates in effect prior to 9/1/49 plus 6% of total freight charges (Ex Parte 168).

(2) Rates in effect 9/1/49 to 4/3/51.

(3) Rates effective 4/4/51.

(See Appendix II attached hereto.)

VI

Appendix II attached hereto and made a part hereof, shows rates effective February 14, 1938, December 23, 1940, October 1, 1945, August 22, 1947, May 6, 1948, September 1, 1949, and present rates from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Chicago, Ill., Milwaukee, Wisc., Waukegan, Ill., and Newport, Vermont.

The statement also shows the same information to Charlotte, N. C. By reference to this statement it will be noted that the rates to all destinations, except Charlotte, N. C. only represents an increase of 11½ cents per 100 pounds on October 1, 1945, when compared with rates in effect February 14, 1938, whereas the rate from Newport, Vermont, to Charlotte, N. C., was increased 6 cents per 100 pounds or a total increase in the rate from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Charlotte, N. C., of 7½ cents per 100 pounds. The statement further shows that on February 14, 1938, the rate to Charlotte, N. C., exceeded the rate on asbestos fibre to Chicago, Ill., [fol. 25] Milwaukee, Wisc., and Waukegan, Ill., 15 cents, December 23, 1940, 17 cents, October 1, 1945, 21 cents, and present rate 32 cents.

The information shown above clearly shows that the rates to Charlotte, N. C., have been increased as indicated in Appendix H, no increase being made to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., except the increases granted in Ex Parte 162, 166, 168 and 175, which increases were also made in the rates to Charlotte, N. C.

VII

Complainant is in competition with manufacturers located at Chicago, Ill., and other points in Official Territory. The manufactured products are shipped from Charlotte, N. C. to destinations in Official Territory, a large movement going to points in the States of Illinois, Indiana, and Michigan. Due to the great difference in the rates on the raw products inbound, and the fact that the outbound rates on the manufactured products are much greater from Charlotte, N. C., to destinations in Official Territory, than the manufacturers located in that territory, serves to place complainant at a great disadvantage.

Appendix III attached hereto and made a part hereof shows short miles, routes, present rates from Thetford Mines, P. Q. Canada, to Chicago, Ill., Milwaukee, Wisc., Waukegan, Ill., and Charlotte, N. C. The statement also shows per car, per mile and per ton mile revenue. By reference to this statement it will be noted that to Milwaukee, Wisc., for a distance of 1079 miles and Charlotte, N. C., a distance of 1080 miles shows the following:

		Revenue	
	Per Car	*Per Car Mile*	*Per Ton Mile*
	(dollars)	*(cents)*	*(mills)*
Milwaukee, Wisc.	420.00	38.9	19.5
Charlotte, N. C.	548.00	50.7	25.4

[fol. 26] The above information shows that rail carriers receive $128.00 per carload of 40,000 pounds, per car mile of 11.8 cents and per ton mile of 5.9 mills greater revenue to Charlotte, N. C., than they receive on similar movements to Milwaukee, Wisc., a point equi-distant.

In June 1948 Southern rail carriers attention was called to the difference in the rates to Charlotte, N. C., as compared with rates to equi-distant points in Official Territory, and in April 1949 the Southern Freight Association, Atlanta, Ga., issued its submittal No. A-705 suggesting through commodity rates on asbestos crude and asbestos fibre, carload minimum weight 40,000 pounds to Charlotte, N. C., as follows:

	Rates Proposed	
From:	Crude	Fibre
Black Lake,) Coleraine,) Thetford Mines, P. Q. Canada)	134	107

The submittal further provided the proposed rates would not be subject to Ex Parte 162, 166 increases.

Submittal A-705 was considered by the General Freight Committee of Southern Carriers at its September 1949 meeting and proposed rates approved. Subsequent to ap-

proval by Southern rail carriers, Submittal A-705 was considered by the Canadian Lines and disapproved.

During the past 14 years on request of complainant, Southern rail carriers have filed other proposals suggesting reduction in the rates on asbestos fibre, in carload lots from Quebec Central Railway origins to Charlotte, N. C., in order to place the rates to Charlotte, N. C., on a closer parity with similar rates maintained to destinations in Official Territory. However, on all of the proposals initiated by the Southern rail carriers, the Canadian and New England rail lines through their rate associations declined to concur in any reduction whatever to Charlotte, N. C.

[fol. 27] It is respectfully submitted that the above action by the Canadian and New England rail carriers through their rate associations, affords manufacturers located at Chicago, Ill., and other points in Official Territory, unduly and unjustly preferential treatment, and is prejudicial to complainant, located at Charlotte, N. C., in violation of Section 3 (1) of the Interstate Commerce Act.

VIII

It is alleged that Thermoid Company, Southern Division, the complainant, Charlotte, North Carolina, on the shipments covered by Appendix I, paid and bore the charges, and that by reason of the unjust and unreasonable charges assessed on the involved shipments, as covered by Appendix I, has been damaged to the extent that the charges assessed and collected exceeded, exceeds, or may exceed such charges as would result from the application of rates in effect on date of movements to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., at carload minimum weight of 40,000 pounds or such other rate or rates as the Commission may find to be just and reasonable.

IX

That by reason of the facts stated in the foregoing paragraphs complainant has been subjected to the payment of rates, charges, etc., for transportation which were when exacted (1) unjust and unreasonable in violation of Section 1 (4) of the Interstate Commerce Act, and (2) unjustly discriminatory in violation of Section 2 and (3) unduly

preferential or prejudicial in violation of Section 3(1) of the Interstate Commerce Act.

PRAYER

WHEREFORE complainant prays that defendants may be required to answer the charges herein; that after hearing [fol. 28] and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of carload shipments of asbestos crude and asbestos fibre, from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Charlotte, North Carolina, in lieu of the rates and minimum weights named hereinbefore, such other rates and minimum weights as the Commission deems reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged to have been paid in excess of rates maintained by defendants on asbestos crude and asbestos fibre, in carload lots, from Black Lake, Coleraine and Thetford Mines, P. Q. Canada, to Chicago, Ill., Milwaukee, Wisc., and Waukegan, Ill., on date of movements involved in this complainant, the sum of $23,435.94 plus interest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that complainant is entitled to as an award of damages under the provisions of said Act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Also pay complainant by way of reparation on any additional shipments that may have moved two years prior to the filing of this complaint and not included in Appendix I, also that may move during the pendency of this complaint.

Respectfully submitted,

THERMOID COMPANY
Southern Division
By .....
H. V. FLEMING
Registered Practitioner

Dated at:
Charlotte, North Carolina,
P. O. Box 985,
This *21st* day of June, 1951.

[fol. 29]

APPENDIX C TO COMPLAINT

Exceptions must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before Feb. 26, 1953

INTERSTATE COMMERCE COMMISSION

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted *Decided*

Combination rates on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, Province of Quebec, Canada, to Charlotte, N. C., not subject to Commission's jurisdiction. Complaint dismissed.

H. V. Fleming for complainant.

Paul F. Robinson, J. A. Kane and *J. Edgar McDonald* for defendants.

REPORT PROPOSED BY J. EDGAR SNIDER, EXAMINER

[fol. 30] Complainant is a corporation engaged in the manufacture, sale and distribution of asbestos textile fabrics with its manufacturing plant at Charlotte, N. C. By complaint filed June 22, 1951, it alleges that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte are unreasonable and in violation of Section 3 of the Interstate Commerce Act. The Commission

is asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period.

At the hearing on this complaint, defendants suggested, in view of the fact that the rates from the Canadian origins to Charlotte were combinations to and from Newport, Vt., a port of entry to the United States on or adjacent to the Canadian border, that the complaint should be limited to the rates from Newport to Charlotte on the ground that otherwise this Commission would be without jurisdiction. Complainant's counsel refused to limit the complaint to the Newport factor for the reason that the allegation of unreasonableness was based on the measure of the joint rates maintained by defendants from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. The examiner therefore directed that the complaint would be heard as drawn.

Under Section 1 of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable for those rates only, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New* [fol. 31] *York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.

So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction.

The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed.

[fol. 32]

APPENDIX D TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Submitted March 9, 1953 *Decided May 25, 1953*

Rates on crude asbestos and asbestos fibre, in carloads, from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte, N. C., found not shown to have been or to be unreasonable, but to be unduly prejudicial. Undue prejudice ordered removed, and reparation denied.

H. V. Fleming for complainant.

Paul F. Robinson, J. A. Kane, and *J. Edgar McDonald* for defendants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS PATTERSON, JOHNSON, AND KNUDSON BY DIVISION 3:

Exceptions to the examiner's proposed report were filed by the complainant. Our conclusions differ from those recommended by the examiner. Exceptions and suggested [fol. 33] findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainant is a corporation engaged at Charlotte, N. C., in the manufacture, sale, and distribution of asbestos textile fabrics. By complaint filed on June 22, 1951, it alleges that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos

fibre from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte were and are unreasonable and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pedente lite*.

The assailed rates[1] are combinations of rates to and from Newport, Vt., a port of entry near the Canadian border. The rates from the Canadian origins to Newport are 33 cents on crude asbestos and 28 cents on asbestos fibre, minimum weight 40,000 pounds, and the rates from Newport to Charlotte on the respective commodities are $1.41 and $1.06, minimum 30,000 pounds.

At the hearing the defendants suggested that the complaint be limited to the rates from Newport to Charlotte on the premise that otherwise this Commission would be without jurisdiction. The complainant refused to so limit the complaint primarily because the allegations of unlawfulness were based in part on the measure of the joint rates maintained by some of the defendants and other rail lines on the same commodities from the same Canadian origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it [fol. 34] takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte.

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[1] Rates are stated in amounts per 100 pounds, and are those in effect just prior to the general increases authorized on March 12, 1951.

Although the complaint does not specifically attack the rates from Newport to Charlotte separate and apart from the combinations of rates to and from Newport, both the complainant and the defendants introduced evidence relating to the rates from Newport. For example, the complainant compares the rate of $1.06 on asbestos fibre from Newport to Charlotte, 972 miles, with a rate of 72 cents, minimum 50,000 pounds, on woodpulp from Berlin, N. H., to Charlotte, 965 miles. Other rates on woodpulp from Berlin to various points in southern territory range from 66 to 89 cents for distances of from 804 to 1,575 miles. The rate of $1.06 is compared also with a rate of 81 cents, minimum 30,000 pounds, on flax mill waste or sweepings from Lee, Mass., to Pisgan Forest, N. C., 851 miles, and a rate of 73 cents, minimum 50,000 pounds, on logs, native wood, from Beecher Falls, Vt., to Hampton, S. C., 1,340 miles. At the time of the hearing all of these commodities were rated eighth class, in carloads, in the southern classification, but the complainant's witness had no knowledge of the average loadings or the movement, if any, under the compared rates.

Most of the asbestos fibre used by the complainant consists of No. 3 or spinning fibre, which has a value ranging [fol. 35] from about $320 to $525 per net ton, f.o.b. mines. It also receives an occasional carload of crude asbestos, which has a value of from $675 to $1,300 per ton. Very little evidence was introduced with respect to the rate on the latter commodity, except that certain unidentified rail carriers maintain a joint rate of $1.32, minimum 40,000 pounds, on crude asbestos from the Canadian origins to Milwaukee and Waukegan.

The rate on asbestos fibre from Newport to Chicago, Milwaukee, and Waukegan is $1.14, minimum 30,000 pounds, as compared with the rate of $1.06 to Charlotte. The rate of $1.06 from Newport to Charlotte is a commodity rate which is 10 cents less than the class-rate basis, whereas the defendants show that class rates generally apply to other destinations in southern territory. The defendants refer also to numerous proceedings before this Commission in which carload ratings higher than eighth class have been

prescribed or approved on various commodities with values within the range of those on asbestos fibres.

Numerous rail carriers, including some of the defendants herein, participate in joint international rates of $1.01 on asbestos fibre and $1.32 on crude asbestos, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. The short-line distances from Thetford Mines, for example, are 992 miles to Chicago, 969 miles to Milwaukee, and 1,019 miles to Waukegan, as compared with the short-line distances of 1,080 miles from Thetford Mines to Charlotte. Shipments to Chicago, Milwaukee, and Waukegan generally move over the lines of the Quebec Central Railway Company to Sherbrooke, Quebec, thence the lines of the Canadian Pacific Railway Company to Detroit, Mich., and the lines of connecting carriers beyond, for distances ranging from 1,000 to 1,143 miles to Chicago, from 1,071 to [fol. 36] 1,245 miles to Milwaukee, and from 1,085 to 1,209 miles to Waukegan.

In the sale of its products the complainant is in competition with manufacturers at Chicago, Milwaukee, and Waukegan, and the differences in the freight rates are an important factor in making sales.

The complainant contends that the foregoing rate adjustment results in undue preference of its competitors at Chicago, Milwaukee, and Waukegan, and in undue prejudice to it. In April 1949, the southern rail lines proposed the establishment of joint rates, lower than the combinations then in effect from the Canadian origins to Charlotte, but the proposal was disapproved by the Canadian lines. So far as appears, the service rendered in connection with this traffic to Charlotte is no greater or more expensive than that, on the average, to Chicago, Milwaukee, and Waukegan.

The defendants state that the rates from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan were originally made with relation to the rates from Sherbrooke, and that the rates from the latter point to these destinations reflected water-competitive conditions then existing on the Great Lakes. There is no evidence, however, that there is any current or prospective

water competition which might justify rates to Chicago, Milwaukee, or Waukegan on a lower level than to Charlotte.

The claim is made by the defendants also that the Canadian rail lines constitute a complete route from the Quebec origins to Chicago and Milwaukee, thereby controlling the rates to those points, and that the United States lines must join in those rates or forego the traffic. We cannot compel the Quebec Central or any of the other defendants to join in the establishment of joint rates from the Canadian origins to Charlotte. However, that carrier, which is a subsidiary of the Canadian Pacific[2], and the [fol. 37] latter carrier effectively participate in the rates to both Chicago, Milwaukee, and Waukegan, and to Charlotte. Newport is about 5 miles south of the Canadian border, and the Quebec Central and Canadian Pacific are the only rail carriers serving that point. Traffic therefrom to Charlotte must move for some distance beyond Newport on the Canadian Pacific before connection can be made with a United States carrier. It is thus within the power of the Canadian Pacific to put an end to the alleged undue prejudice by refusing to continue to participate in the joint rates to Chicago, Milwaukee, and Waukegan herein shown to be preferential, or, especially since the United States carriers appear to be willing, by reducing the rate to Charlotte. *Peters Cartridge Co.* v. *Director General*, 73 I.C.C. 311, 314.

The evidence is clear that the complainant's competitors at Chicago, Milwaukee, and Waukegan are being unduly preferred to the undue prejudice and disadvantage of the complainant. There is no showing, however, with sufficient particularity to warrant an award of reparation, that the complainant has been damaged by reason of any undue prejudice which may have existed in the past.

We conclude that the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic

[2] See *Lease of Line by C. P. Ry.*, 105 I.C.C. 575, 576.

from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered.

[fol. 38]

APPENDIX E TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31683

RAYBESTOS-MANHATTAN, INCORPORATED,
GENERAL ASBESTOS AND RUBBER DIVISION,

Complainant,

—v.—

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Defendants.

COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products manufactured from crude asbestos and asbestos fibre.

That complainant Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division, is a corporation incorporated under the laws of the State of New Jersey with its principal office at Passaic, New Jersey, with an asbestos textile manufacturing plant at North Charleston, South Carolina.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as com-
[fol. 39] mon carriers by railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

III

That said defendants publish or participate in rates on crude asbestos and asbestos fibre from mines at Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada, to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos and asbestos fibre from the mines named in paragraph III to North Charleston, South Carolina, which are combinations of commodity and class rates made over United States points, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E.504, as supplemented, and Trunk Line Territory Tariff Bureau Freight Tariff No. E/S 1008, agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official, Southern, and Western Territories in keen and [fol. 40] severe competition with manufacturers located in Official and Western Territories; and that both complainant and its competitors receive crude asbestos and asbestos fibre from mines named in paragraph III.

VI

That the rates on crude asbestos and asbestos fibre maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities

from the same mines to North Charleston, S. C.; and that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Office Territory and Western Territory points adjacent thereto.

VII

That the complainant in the manufacturing, selling and distributing of asbestos textile products made or received or caused to be made or received during the period two years prior to the date of this complaint various carload shipments of crude asbestos and asbestos fibre from mines named in paragraph III to North Charleston, S. C. and that complainant is and will continue to make or receive or cause to be made or received other shipments of a like nature.

VIII

That defendants assessed and complainants paid and/or bore transportation charges on the shipments involved at the rates in effect at the time of movement.

[fol. 41]

IX

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates and charges which were when exacted, now are and will continue to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial in violation of section 3 thereof.

That complainant has been injured thereby to his damage in a sum amounting to the difference between the rates and charges collected and those which would accrue on the basis of such reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission.

WHEREFORE complainant prays that the defendants, and each of them, be required to answer the charges herein;

that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos and asbestos fibre from the origins named in paragraph III hereof to North Charleston, S. C., in lieu of the rates and charges named in paragraph IV hereof, such other rates and charges as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged a sum amounting to the difference between the rates and charges collected, and those that may be collected during the pendency of this proceeding, and the charges which would have accrued on the basis of reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission, with interest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall determine that com-
[fol. 42] plainant is entitled to as an award of damages under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at
Washington, D. C.
December 6, 1954.

RAYBESTOS MANHATTAN, INC.
By: A. R. Murphy, Traffic Manager
North Charleston, S. C.

E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

[fol. 43]

Appendix No. 1.

List of Defendants

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
[fol. 44] Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.

Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railway Company (Canadian National Railway Company, Lessee).
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
[fol. 45] Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.

The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company
(Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company
(Peter Duryee, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company
(Ferdinand J. Sieghardt, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
[fol. 46] The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation
(William E. Navin and Oscar O. Edlund, Trustees).

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.

St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

Canadian Pacific Railway Company.

Quebec Central Railway Company.

[fol. 47]

APPENDIX F TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31,684

THERMOID COMPANY,
SOUTHERN DIVISION
Complainant,

—v.—

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Defendants.

COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products manufactured from asbestos and asbestos fibre.

That complainant Thermoid Company, Southern Division, is a corporation under the laws of Delaware, its principal office being located at Trenton, New Jersey, and its textile asbestos manufacturing plant being located at Charlotte, North Carolina. The Thermoid Company, Southern Division, is also the complainant in Docket No. 30846 which has been reopened for further hearing by this Commission by order of July 30, 1954. The issues in Docket No. 30846 involve rates and charges assessed for the transportation of crude asbestos and asbestos fibre from mines located on the Quebec Central Railway Company in the Province of Quebec, Canada, to Charlotte, North [fol. 48] Carolina. The instant complaint involves published rates and charges on the same commodities from mines located on the Canadian National Railways in the Province of Quebec, Canada, which are in juxtaposition to and in competition with the mines located on the Quebec Central Railway Company in the same Province of Canada.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as common carriers by railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

III

That said defendants publish or participate in rates on crude asbestos and asbestos fibre from mines at Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos and asbestos fibre from the mines named in paragraph III to Charlotte, North Carolina, which are combinations of commodity rates or combinations of com-

modity and class rates made over United States points, as shown in Canadian National Railways Tariff No. C. [1284, I.C.C. No. E. 504, as supplemented, New England Territory Railroads Tariff Bureau Tariff No. 47-E, Agent [fol. 49] C. R. Goldrich's I.C.C. No. 610, as supplemented and Trunk Line Territory Tariff Bureau Freight Tariff No. E-S 1008, Agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official and Southern Territories in keen and severe competition with manufacturers located in Official and Western Territories; and that complainant's competitors receive crude asbestos and asbestos fibre from mines named in paragraph III; and that complainant is entitled to have available to it said raw materials from such mines at reasonable, just, non-preferential and non-prejudicial rates and charges.

VI

That the rates on crude asbestos and asbestos fibre maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities from the same mines to Charlotte, North Carolina; and that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Official Territory and Western Territory points adjacent thereto.

VII

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates which are (1) unjust and unreasonable in [fol. 50] violation of section 1 of the Interstate Commerce Act, and (2) unduly preferential or prejudicial in violation of section 3 thereof.

WHEREFORE complainant prays that the defendants, and each of them, be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos and asbestos fibre from mines named in paragraph III hereof to Charlotte, North Carolina, in lieu of the rates and charges named in paragraph IV, such other rates and charges as the Commission may deem reasonable and just, and that such other and further order or orders be made as the Commission may consider proper in the premises.

THERMOID COMPANY
SOUTHERN DIVISION

By: E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

Dated at
Washington, D. C.
December 6, 1954

H. V. Fleming,
Registered Practitioner
P. O. Box 985
Charlotte, N. C.

[fol. 51] APPENDIX No. 1

LIST OF DEFENDANTS

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Sante Fe Railway Company.

The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
[fol. 52] Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
[fol. 53] Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.
The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company
(Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company
(Peter Duryee, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.

The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company.
(Ferdinand A. Sieghardt, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
[Vol. 54] The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation
(William E. Navin and Oscar O. Edlund, Trustees).

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

[fol. 55]

APPENDIX G TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31685

UNION ASBESTOS AND RUBBER COMPANY

Complainant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,

Defendants.

COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products manufactured from crude asbestos and asbestos fibre.

That complainant, Union Asbestos and Rubber Company, is a corporation incorporated under the laws of the State of Illinois with its principal office at Chicago, Illinois, and its asbestos textile manufacturing plant at Marshville, North Carolina.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as common carriers by railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

[fol. 56]

III

That said defendants publish or participate in rates on crude asbestos and asbestos fibre from mines at Black Lake, Coleraine, East Broughton, Robertson, Thetford

Mines, St. Joseph, Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada, to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos and asbestos fibre from the mines named in paragraph III to Marshville, North Carolina, which are combinations of commodity rates or combinations of commodity and class rates made over United States points, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented, New England Territory Railroads Tariff Bureau Tariff No. 47-E, Agent C. R. Goldrich's I.C.C. No. 610, as supplemented, and Trunk Line Territory Tariff Bureau Freight Tariff No. E/S 1008, Agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official, Southern, and Western Territories in keen and [fol. 57] severe competition with manufacturers located in Official and Western Territories; and that both complainant and its competitors receive crude asbestos and asbestos fibre from mines named in paragraph III.

VI

That the rates on crude asbestos and asbestos fibre maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities from the same mines to Marshville, N. C.; and

that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Official Territory and Western Territory points adjacent thereto.

VII

That the complainant in the manufacturing, selling and distributing of asbestos textile products made or received or caused to be made or received during the period two years prior to the date of this complaint various carload shipments of crude asbestos and asbestos fibre from mines named in paragraph III to Marshville, N. C. and that complainant is and will continue to make or receive or cause to be made or received other shipments of a like nature.

VIII

That defendants assessed and complainants paid and/or bore transportation charges on the shipments involved at the rates in effect at the time of movement.

[fol. 58]

IX

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates and charges which were when exacted, now are and will continue to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial in violation of section 3 thereof.

That complainant has been injured thereby to his damage in a sum amounting to the difference between the rates and charges collected and those which would accrue on the basis of such reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission.

Wherefore complainant prays that the defendants, and each of them, be required to answer the charges herein; that after due hearing and investigation an order be made

commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos and asbestos fibre from the origins named in paragraph III hereof to Marshville, N. C., in lieu of the rates and charges named in paragraph IV hereof, such other rates and charges as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged a sum amounting to the difference between the rates and charges collected, and those that may be collected during the pendency of this proceeding, and the charges which would have accrued on the basis of reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission, with interest, or such other sum as, in view of the evidence to be adduced herein, the Commission shall [fol. 59] determine that complainant is entitled to as an award of damages under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at
Washington, D.C.
December 13, 1954

UNION ASBESTOS AND RUBBER COMPANY

By E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

H. V. FLEMING,
Registered Practitioner
P. O. Box 985
Charlotte, N. C.

[fol. 60] APPENDIX No. 1

LIST OF DEFENDANTS

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
[fol. 61] Chicago, Indianapolis and Louisville Railway Company.
Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago North Shore and Milwaukee Railway.

Chicago, Rock Island and Pacific Railroad Company.
Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company
(Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company
(Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
[fol. 62] Indiana Harbor Belt Railroad Company.

The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.

The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company.
(Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company
(Horace Banta, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company
(Lewis D. Freeman, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
[fol. 63] The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation.

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.

Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

Canadian Pacific Railway Company.

Quebec Central Railway Company.

[fol. 64] APPENDIX H TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31686

CAROLINA ASBESTOS COMPANY,
Complainant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.,
Defendants.

COMPLAINT

Complainant respectfully shows:

I

That complainant is engaged in the manufacturing, selling and distributing of asbestos textile products and other products manufactured from asbestos, viz, crude, fibre, refuse, shorts, waste, etc.

That complainant, Carolina Asbestos Company, is a corporation under the laws of North Carolina, its principal office and its asbestos textile manufacturing plant being located at Davidson, North Carolina.

II

The defendants named in Appendix No. 1 attached hereto and made a part hereof are corporations engaged as common carriers by Railroad between points in the United States and Canada, and as such are subject to the Interstate Commerce Act, as amended.

[fol. 65] That said defendants publish or participate in rates on crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste from mines at Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, all in the Province of Quebec, Canada to points in Official Territory, and points in Western Territory adjacent thereto, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, and Canadian National Railways Tariff No. C. U. 128-4, I.C.C. No. E. 504, as supplemented.

IV

That said defendants also publish or participate in rates on crude asbestos, asbestos fibre, refuse, asbestos shorts, and asbestos waste from the mines named in paragraph III to Davidson, North Carolina, which are combinations of commodity rates, and combinations of commodity and class rates made over United States points, as shown in Quebec Central Railway Company Tariff No. 11-C, I.C.C. No. 450, as supplemented, Canadian National Railways Tariff No. C. U. 128-4, I. C. C. No. E 504, as Supplemented, New England Territory Tariff Bureau Tariff No. 47-E, Agent C. R. Goldrich, I.C.C. No. 610, as supplemented, and Trunk Line Territory Tariff Bureau Freight Tariff No. E/S 1008, Agent C. W. Boin's I.C.C. No. A-946, as supplemented; and that such rates, and the charges resulting therefrom, are excessive, unjust, and unreasonable.

V

That complainant markets its manufactured products in Official and Southern Territories in keen and severe com-[fol. 66] petition with manufacturers located in Official Territory; and that both complainant and its competitors receive crude asbestos, asbestos fibre, asbestos refuse, asbestos

shorts, and asbestos waste from mines named in paragraph III.

VI

That the rates on crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste maintained by defendants from the mines to the destinations named in paragraph III are lower per se and relatively than the rates maintained by defendants on those commodities from the same mines to Davidson, North Carolina; and that such rates give rise to and do cause undue and unreasonable prejudice and disadvantage to complainant, and to undue and unreasonable preference and advantage to complainant's competitors in Official Territory and points adjacent thereto.

VII

That the complainant in the manufacturing, selling and distributing asbestos textile products made or received or caused to be made or received during the period two years prior to the date of this complaint various carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste from mines named in paragraph III to Davidson, North Carolina and that complainant is and will continue to make or receive or cause to be made or received other shipments of a like nature.

VIII

That defendants assessed and complainants paid and/or bore transportation charges on the shipments involved at the rates in effect at the time of movement.

[fol. 67]

IX

That by reason of the facts stated in the foregoing paragraphs, complainant has been and is subjected to the payment of rates and charges which were when exacted, now are and will continue to be unjust and unreasonable in violation of section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial in violation of section 3 thereof.

That complainant has been injured thereby to his damage in a sum amounting to the difference between the rates

and charges collected and those which would accrue on the basis of such reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission.

WHEREFORE complainant prays that the defendants, and each of them, be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and establish and put in force and apply in future to the transportation of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste from the origins named in paragraph III hereof to Davidson, North Carolina, in lieu of the rates and charges named in paragraph IV hereof, such other rates and charges as the Commission may deem reasonable and just, and also pay to complainant by way of reparation for the unlawful charges hereinbefore alleged a sum amounting to the difference between the rates and charges collected, and those that may be collected during the pendency of this proceeding, and the charges which would have accrued on the basis of reasonable, non-prejudicial and non-preferential rates and charges as shall hereafter be found reasonable by this Commission, with interest, or such other sum as, in view [fol. 68] of the evidence to be adduced herein, the Commission shall determine that the complainant is entitled to as an award of damages under the provisions of said act for violation thereof, and that such other and further order or orders be made as the Commission may consider proper in the premises.

Dated at
Washington, D. C.
December 13, 1954

Carolina Asbestos Company

By: E. B. Ussery
Herbert C. Jones, Jr.
Investment Building
Washington 5, D. C.
Attorneys for Complainant

[fol. 69]

Appendix No. 1

List of Defendants

The Akron, Canton & Youngstown Railroad Company.
The Alabama Great Southern Railroad Company.
Alton and Southern Railroad.
The Ann Arbor Railroad Company.
The Atchison, Topeka and Santa Fe Railway Company.
The Atlantic and Danville Railway Company.
Atlantic Coast Line Railroad Company.

The Baltimore and Ohio Chicago Terminal Railroad Company.
The Baltimore and Ohio Railroad Company.
The Belt Railway Company of Chicago.
Bessemer and Lake Erie Railroad Company.
Boston and Maine Railroad.
Brooklyn Eastern District Terminal.
Bush Terminal Railroad Company.

Canadian National Railway Company.
Canadian National Railways.
The Canadian Pacific Car and Passenger Transfer Company, Limited.
The Central Railroad Company of New Jersey.
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company.
Chicago & Eastern Illinois Railroad Company.
Chicago & Illinois Midland Railway Company.
Chicago and North Western Railway Company.
Chicago Aurora and Elgin Railway Company.
Chicago, Burlington & Quincy Railroad Company.
Chicago Great Western Railway Company.
Chicago, Indianapolis and Louisville Railway Company.
[fol. 70] Chicago, Milwaukee, St. Paul and Pacific Railroad Company.
Chicago North Shore and Milwaukee Railway.
Chicago, Rock Island and Pacific Railroad Company.

Chicago, Saint Paul, Minneapolis and Omaha Railway Company.
Chicago South Shore and South Bend Railroad.
The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Delaware and Hudson Railroad Corporation.
The Delaware, Lackawanna and Western Railroad Company.
The Detroit and Toledo Shore Line Railroad Company.
Detroit, Toledo and Ironton Railroad Company.
Duluth, South Shore and Atlantic Railroad Company.

Elgin, Joliet and Eastern Railway Company.
Erie Railroad Company.

Grand Trunk Railway System
(Lines in the United States, east of the west bank of the Detroit and St. Clair Rivers) comprising the following carriers:
Canadian National Railway Company
The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee)
The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee).
Grand Trunk Western Railroad Company.
Great Northern Railway Company.
Gulf, Mobile and Ohio Railroad Company.

Hoboken Manufacturers Railroad Company.

Illinois Central Railroad Company.
Illinois Terminal Railroad Company.
Indiana Harbor Belt Railroad Company.

[fol. 71] The Lehigh and Hudson River Railway Company.
Lehigh and New England Railroad Company.
Lehigh Valley Railroad Company.
The Long Island Rail Road Company
(Wm. Wyer, Trustee).
Louisville and Nashville Railroad Company.

Maine Central Railroad Company.
Manufacturers Railway Company.

The Minneapolis & St. Louis Railway Company.
Minneapolis, St. Paul & Sault Ste. Marie Railroad Company.
Missouri Pacific Railroad Company (Guy A. Thompson, Trustee).

Napierville Junction Railway Company.
The Nashville, Chattanooga & St. Louis Railway.
The New Jersey and New York Railroad Company (Horace Banta, Trustee).
New Jersey, Indiana & Illinois Railroad Company.
New Orleans and Northeastern Railroad Company.
The New York Central Railroad Company.
The New York, Chicago and St. Louis Railroad Company.
The New York Connecting Rail Road Company.
New York Dock Railway.
The New York, New Haven and Hartford Railroad Company.
New York, Ontario and Western Railway Company (Lewis D. Freeman, Trustee).
New York, Susquehanna and Western Railroad Company.
Norfolk and Western Railway Company.
Norfolk Southern Railway Company.
Northern Pacific Railway Company.

Paducah & Illinois Railroad Company.
The Pennsylvania-Ontario Transportation Company.
The Pennsylvania Railroad Company.
[fol. 72] Pennsylvania-Reading Seashore Lines.
Piedmont and Northern Railway Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Port Huron and Detroit Railroad Company.

Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
Rutland Railway Corporation.

St. Johnsburg & Lamoille County Railroad.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
Seaboard Air Line Railroad Company.
Southern Railway Company.

Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company.
The Texas and Pacific Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toronto, Hamilton and Buffalo Railway Company.

The Virginian Railway Company.

Wabash Railroad Company.
Western Maryland Railway Company.

Canadian Pacific Railway Company.

Quebec Central Railway Company.

[fol. 73]

APPENDIX I TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 30846[1]

THERMOID COMPANY, SOUTHERN DIVISION v. BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

Decided May 7, 1958

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1. Rates on crude asbestos and asbestos fiber from Danville, St. Malachie, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Quebec, Canada, to Charlotte, Davidson, and Marshville, N. C., and North Charleston, S. C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and for the future found to be unduly prejudicial.

---

[1] This report embraces also No. 31683, Raybestos-Manhattan, Inc., General Asbestos & Rubber Division *v.* Baltimore & Ohio Railroad Company et al.; No. 31684, Thermoid Company, Southern Division *v.* Same; No. 31685, Union Asbestos & Rubber Company *v.* Same; and No. 31686, Carolina Asbestos Company *v.* Same.

Reparation awarded, and defendants required to remove the unlawfulness found to exist.

2. Commission found without jurisdiction to prescribe just and reasonable joint through international rates for the future. Prior findings, 288 I.C.C. 793, modified.

Appearances as shown in prior report, and:

E. B. Ussery, Harvey L. Golden, and H. V. Fleming for complainants.

J. Edgar McDonald, R. C. Gill, Donal L. Turkal, James L. Tapley, and J. Raymond Hoover for defendants.

REPORT[2] OF THE COMMISSION

By the Commission:

Exceptions were filed by the defendants to the report proposed by the examiner, the complainants replied, and [fol. 74] the issues were orally argued before us. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings on conclusions have been considered and found not justified.

In the title proceeding, the complainant, a corporation engaged at Charlotte, N. Y., in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed on July 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte were and are unjust, unreasonable, and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

In the prior report in that proceeding, 288 I. C. C. 793, division 3 found that the assailed rates had not been shown to have been or to be unjust or unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they exceed or may exceed the joint rates that

[2] On further hearing in No. 30846.

are or hereafter may be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceeding reopened for oral argument and reconsideration. Thereafter, upon petition of the complainant, the proceeding was reopened for further hearing which was held with the embraced proceedings on a consolidated record.

In No. 31684, the same complainant, by complaint filed on December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and [fol. 75] unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of complainant's competitors located in those territories. We are asked to prescribe lawful rates for the future.

In No. 31683, by complaint filed on December 6, 1954, and in Nos. 31685 and 31686, by complaints filed on December 13, 1954, the complainant corporations, which likewise are engaged in the manufacture, sale, and distribution of asbestos textile products, at North Charlston, S. C., and Marshville and Davidson, N. C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada, to North Charleston, Marshville, and Davidson were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is engaged also in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are

unlawful in like respects. These complainants ask us to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

The most important variety of asbestos commercially, of which there are several, is chrysotile, which constitutes about 95 percent of world production. Domestic production of asbestos is negligible, and American manufacturers are dependent upon foreign supplies. The most important [fol. 76] commercial production of asbestos of the chrysotile variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide between Danville and East Broughton, and embraces most of the origin points here concerned. Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke to Valley Junction, Quebec, Canada, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, Quebec, and St. Malachie is on the lines of the same carrier extending eastward from Diamond, Quebec, Canada. There is no record of any movement from St. Joseph, and that point will not be further considered.

On the basis of use, asbestos falls into two principal classes; namely, spinning and nonspinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Nonspinning fibers consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

The rates[3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste,

[3] Rates are stated in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

and asbestos refuse and shorts. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for rate-making [fol. 77] purposes, and Thetford Mines and Danville will hereinafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory, and points in western territory adjacent thereto, the defendants maintain joint through international commodity rates. The rates from Danville are substantially lower than those from Thetford Mines, although the distances do not vary greatly. To southern destinations, however, no joint through rates are maintained, and the complainants are required to pay charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of a joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore to the considered destinations, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates apply on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,* where it connects with the Canadian

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*By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific Railway Company. See *Canadian Pacific Ry. Co. Lease*, 105 I.C.C. 575, 576.

[fol. 78] Pacific. These are the only rail carriers serving Newport. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Danville on shipments routed to Marshville through Rouses Point, N. Y., another customs port of entry located about 0.5 mile from the international boundary, at which the shipments are interchanged by the Canadian National with The Delaware and Hudson Railroad Corporation. Until about November 1955, shipments routed from Danville through East Alburgh, and charged at that rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, Canada, for operating convenience, and on such shipments no transportation within the United States was performed by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, are 33 cents, minimum 40,000 pounds, on crude asbestos, 28 cents, minimum 40,000 pounds, and 25 cents, minimum 80,000 pounds, on asbestos fiber, and 14 cents, minimum 60,000 pounds, and 13 cents minimum 80,000 pounds, on asbestos refuse and shorts. On asbestos waste from Thetford Mines to Newport, the proportional rates are 20 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds. On asbestos waste from Danville to Baltimore, the joint through rates are 53 cents, minimum 60,000 pounds, and 48 cents, minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35[5], minimum 50,000 pounds, asbestos fiber is rated class 35, minimum 30,000 pounds, asbestos shorts and waste are rated class 27.5, minimum 40,000 [fol. 79] pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport

[5] Class numbers represent percentages of the docket No. 28300 first-class rates.

to the same respective destinations, the class 35 rates are $1.21, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville, apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth-class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-rate routing. Because of lesser increases imposed on commodity rates than on class rates, and the adjustment of class-rate scales under our order in docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth-section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are [fol. 80] manufactured by concerns with plants at Ambler, Pa., Manville, N. J., North Brookfield, Mass., Chicago, Ill., Meredith, N. H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cincinnati, Ohio, Rutherford, N. J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of 0.1 to 0.25 cent per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint through

international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents, and later 10 cents, over the Sherbrooke rates. In September 1954, after a few rates on asbestos fiber had been established with an 80,000-pound minimum to a limited number of points, similar rates were published to numerous destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the complainants do not have the advantage of such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds.

The table in the appendix hereto compares representative applicable joint through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston. It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. As- [fol. 81] bestos producers on the Quebec Central, on shipments to points in official territory, absorb these rates differences, so that for all practical purposes receivers in that territory receive the benefit of the Canadian National rates. The complainants raise no issue concerning these rate differences as such, but ask that, if relief is afforded them, similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distance. For example, the rates on asbestos fiber from Danville to Ogdensburg, N. Y., 209 miles, and to Winchester, Va., 700 miles, are the same as the rates to Ambler and Manville, 68 cents, minimum

40,000 pounds and 61 cents, minimum 80,000 pounds, and the same rates apply to practically all points in trunkline territory from New York, N. Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thefford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1,024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1,026 miles, and to Hanibal, Mo., 1,149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08, minimum 60,000 pounds, and $1.07, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler [fol. 82] and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from Thetford Mines, the combination rates to Davidson are $1.14, minimum 60,000 pounds, and $1.12, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago, and 67 cents and 60 cents to St. Louis.

Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the docket No. 15879 class rates formerly prescribed for application within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official-territory points with the class rates and with combination rates constructed as are the rates to the complainants' destinations. For example, on crude

asbestos from Thetford Mines to Ambler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate 1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

Asbestos is produced at Matheson, Ontario, and Vancouver, British Columbia, Canada. The rates on crude asbestos and asbestos fiber from Matheson to Chicago and [fol. 83] St. Louis are the same as those from Danville, for comparable distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the considered Carolina destinations, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana points; $1.01 to group D embracing Chicago; and 93 cents to group E-4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destinations, the rate to group K was reduced to $1.38. This rate was likewise made applicable to group A points, and the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson, Calif., for distances approximately 2.5 times those to the Carolina destinations, on asbestos fiber are $1.72 and $1.89, minimum 60,000 pounds, and $1.28 and $1.45, minimum 80,000 pounds; on asbestos waste, $1.13 and $1.27, minimum 80,000 pounds; and on asbestos refuse and shorts, $1.13 and $1.22, minimum 80,000 pounds.

The complainants have lost ground in recent years in their efforts to compete in the sale of asbestos textile products, particularly since the readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000 pounds.

The proportion of the industrywide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first 3 months of 1955. In 1949 this complaint marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 that percentage dropped to 80.2. Raybestos-Manhattan, Inc., experienced a [fol. 84] decline in its proportion of total industry production from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952, the production of asbestos textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production. By 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has generally maintained its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official-territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles has been confined to North Carolina and South Carolina by reason of the competition from official-territory producers, and even there the competition is keen.

In April 1949, the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte, but the proposal was disapproved by the other lines. The defendants show that traditionally rates from Canadian origins to points in the South are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction

in these proceedings only over the rate factors applicable [fol. 85] southbound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the South, with which they compare favorably. They contend, also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian carriers, over their lines from border points in Michigan, can effect delivery without participation of United States carriers. They admit, however, that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, particularly upon the establishment of the 80,000-pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500 to $1,500 per ton, milled asbestos spinning fibers at $300 to $525 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75 to $80 a ton, and assert that, in their view, the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories*, 299 I. C. C. 375, and were there found not shown to be just and reasonable, and ordered canceled. The defendants show also, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of the shipments to the Carolina [fol. 86] destinations are of spinning grades, that the reverse is true in official and western territories, and that there are few, if any, shipments of spinning fibers from these origins to points west of Akron, Ohio. Based on the

latter circumstances, it was indicated at the hearing that a revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor-carrier competition, but the record is clear that the present rate structure was effected long before motor competition was a factor.

The complainants contend that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the prescription of joint through rates from the Canadian origins to their destinations reasonably related to the rate structure maintained to official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.

Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear [fol. 87] alternative with respect to their participation in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I. C. C. 15. We have no jurisdiction to prescribe inter-

national rates for application partly within Canada, as sought by the complainants.

The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary. In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, 143, the defendants challenged our jurisdiction to pass upon the reasonableness of joint through rates to Canada [fol. 88] because they had published just and reasonable rates to Rouses Point, regarded generally as a Canadian border point. Division 4 pointed out, however, that the rates to Rouses Point were local rates and that if, as the defendants contended, they were intended to apply to the Canadian border, they should have been so published in clear and unequivocal terms. In *Newsprint Paper to Detroit*, 161 I.C.C. 637, division 5 stated, at page 639:

> It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transportation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was in violation of

section 6 of the act. We have under the circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom.

In *Charles S. Simpson Co.* v. *Grand Trunk W. Ry. Co.*, 129 I.C.C. 430, division 4 considered the reasonableness of refrigeration charges from Port Huron, Mich., an interchange point between the Grand Trunk Western and the Canadian National, to Toronto, Ontario, and Montreal, Quebec, Canada, and found them not unreasonable. In *Larrowe Milling Co.* v. *Chatham, W. & L.E.R. Co.*, 52 I.C.C. 145, which involved the charges on beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey, reparation was awarded against the carriers that performed the haul within the United States, although it was stated that the haul performed by the Michigan Central Railroad Company to Suspension Bridge, N. Y., was almost wholly without the boundaries of the United States. In *Iron or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 I.C.C. 515, the respondents contended that this Commission should not take jurisdiction over rates which included hauls of only 6.04 miles within the United States [fol. 89] to the Canadian border, the distance therefrom to the Canadian destination approximating 122 miles. The contention was rejected by division 3.

In other proceedings not concerned with the matter of rates, we have noted jurisdiction over that portion of a rail line extending south of the Canadian border even though the haul within the United States was small as compared with the total mileage. In *Hereford Ry. Co. Control*, 99 I.C.C. 7, division 4 authorized the Maine Central Railroad Company to acquire control of the Hereford Railway Company, a Canadian carrier 52.85 miles long, and to abandon that portion of the line extending 0.67 mile into Coos County, N. H. In *Status of Napierville Junction Ry. Co.*, 266 I.C.C. 471, it was found that the respondent was not a common carrier subject to part I of the act since its operations stopped at the Canadian-United States boundary, and the haul therefrom to Rouses Point, 1.1 miles, was performed by The Delaware and Hudson Railroad Corporation.

The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.

As above indicated, the defendants maintain joint through commodity rates from the considered Canadian origins to numerous points in official territory. The rates shown in the appendix hereto to Ambler apply to 26 destinations on crude asbestos for distances ranging from 377 to 678 miles, and averaging 513 miles, from Danville, and from 455 to 719 miles, averaging 553 miles, from Thetford Mines; and on asbestos fiber to over 150 destinations for distances ranging from 209 to 710 miles, averaging 493 miles, from [fol. 90] Danville, and from 314 to 788 miles, averaging 545 miles, from Thetford Mines. The range in distances on asbestos refuse and shorts is about the same as an asbestos fiber. Thus, it appears that Ambler, where asbestos products are manufactured (529 miles from Danville and 570 miles from Thetford Mines), is a representative destination in these groupings.

From Thetford Mines to Ambler, the commodity rates of 97 cents, minimum 40,000 pounds, on crude asbestos, 86 cents, minimum 40,000 pounds, on asbestos fiber, 58 cents, minimum 60,000 pounds, on refuse and shorts, and 62 cents, minimum 60,000 pounds, on waste are about 86, 80, 76, and 81 percent, respectively, of what the rates would be if constructed on a combination basis in a manner similar to that used in constructing the rates to the considered Carolina destinations. The 80,000-pound commodity rates to Ambler on asbestos fiber, refuse and shorts, and waste are approximately 90 percent of those subject to the lower minimum weights. The rates herein found just and reasonable to Carolina destinations are constructed on a substantially similar basis. For example, the rate of $1.33 found just and reasonable on crude asbestos, minimum 40,000 pounds, from Thetford Mines to Charlotte is about 86 percent of the combination rate of $1.54. Moreover, the rates herein found just and reasonable to the Carolina

destinations are substantially higher, distance considered, than the rates to numerous destinations in official territory. See, for example, the rates shown in the appendix hereto of $1.14, minimum 40,000 pounds, and $1.04, minimum 80,000 pounds, on asbestos fiber from Thetford Mines to Kirkwood (St. Louis), Mo., 1,198 miles, as compared with respective rates of $1.20 and $1.10 found reasonable herein on the same commodity from the same origin to Charlotte, 1,083 miles.

It is clear that the complainants' competitors at Ambler and other destinations in official territory are being un- [fol. 91] duly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. The rates from the Quebec Central mines generally are on a higher level to points in official territory than those from the Canadian National mines, and appear to represent reasonable maxima. Equitable treatment of the complainants would require, however, that they be accorded rate levels from the Canadian National mines which are relatively the same as those available to receivers in official territory in order to remove the undue preference and prejudice found to exist. As stated, we have no authority to prescribe for the future joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on international traffic to the extent that the transportation takes place within the United States.

We find that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, and Warwick, rates of $1.33, minimum 40,000 pounds, on crude asbestos, and $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, on asbestos fiber to Charlotte; and from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick of $1.33 to Davidson and Marshville and $1.41 to North Charleston

on crude asbestos, minimum 40,000 pounds, of $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, to Davidson and Marshville, and $1.27, minimum 40,000 pounds, and $1.16, minimum 80,000 pounds, to North Charleston on asbestos fiber; and to Davidson of 82 cents, minimum 60,000 pounds, and 74 cents, minimum 80,000 [fol. 92] pounds, on asbestos refuse and shorts, and of 88 cents, minimum 60,000 pounds, and 80 cents, minimum 80,000 pounds, on asbestos waste.

We further find that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler and destinations taking the same rates, by the following amounts: On crude asbestos 36 cents, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 44 cents, minimum 40,000 pounds, from the latter origins to North Charleston; on asbestos fiber, 34 cents, minimum 40,000 pounds, and 31 cents, minimum 80,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 41 cents, minimum 40,000 pounds, and 37 cents, minimum 80,000 pounds, from the latter origins to North Charleston; and to Davidson from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, 24 cents, minimum 60,000 pounds, and 21 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and 21 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds, on asbestos waste.

We further find that on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will

[fol. 93] be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

We further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, were damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases herein found to have been just and reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In instances where shipments from Danville and Warwick were interchanged by the Canadian National at St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp.* v. *Holton I.-U. R. Co.*, 164 I.C.C. 505, 510.

To all of the rates resulting from the findings herein may be added the applicable general increases authorized on and subsequent to March 12, 1951.

An order will be entered vacating the prior order in No. 30846, and requiring the removal of the undue preference and prejudice found to exist.

CHAIRMAN FREAS dissents.

COMMISSIONERS MITCHELL and GOFF did not participate in the disposition of this proceeding.

[fol. 94]

APPENDIX

To—	Crude asbestos				Asbestos fiber			
	From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada		From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada	
	Short-line distance	Rates,[1] minimum 40,000 pounds	Short-line distance	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds
	Miles	*Cents*	*Miles*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Manville, N. J.	480	68	521	97	68	61	86	79
Ambler, Pa.	529	68	570	97	68	61	86	79
Chicago, Ill.	907	103	987	132	85	77	101	93
Kirkwood (St. Louis), Mo.	1,118		1,198		97	87	114	104
Richmond, Va.	782		823		100	90	118	108
Charlotte, N. C.	1,042	150	1,083	154	134	131	134	131
Davidson, N. C.	1,031	149	1,072	152	134	131	134	131
Marshville, N. C.	1,068	152	1,109	156	136	133	136	133
North Charleston, S. C.	1,175	159	1,216	163	154	151	158	155

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 50,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 30,000 pounds beyond.

[fol. 95]

APPENDIX J TO COMPLAINT

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of May, A. D. 1958.

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

[fol. 96] These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and the prior report in No. 30846, 288 I.C.C. 793, are hereby referred to and made a part hereof; and the Commission having found in the report of even date that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, in carloads, from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, Quebec, Canada, to certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants and unduly preferential of the complainants' competitors to the extent indicated in said report of even date:

It is ordered, That the defendants named in the complaints, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue prejudice and preference referred to in the preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices [fol. 97] which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

And it is further ordered, That the order of May 25, 1953 in No. 30846, be, and it is hereby, vacated and set aside, and that this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 98]

Appendix K to Complaint

Before the Interstate Commerce Commission

Docket No. 30846*

Thermoid Company, Southern Division

— v. —

Baltimore & Ohio Railroad Company et al.

Petition of Defendants for Reopening and Reconsideration

Come now the defendants in the above-entitled proceeding, sometimes hereinafter referred to as petitioners, and respectfully ask the Commission to reopen the said proceeding for oral argument before and reconsideration by the entire Commission.

In support of their request, petitioners show:

Résumé of the Proceedings

These proceedings embrace five complaints, four of which complaints were filed after the original disposition of the first complaint.

[fol. 99] The complaint on behalf of Thermoid Company, Southern Division (Docket No. 30846) filed June 22, 1951, assails the *combination* rates and charges applicable on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., to Char-

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* This proceeding also embraces *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31683; *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31684; *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31685; and *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31686.

lotte, N. C. It alleges (Para. V) that those rates were and are unjust and unreasonable, in violation of Section 1 of the Act. The complaint states (Para. VII) that because of the difference in the rates on the inbound raw materials and the fact that the rates on the outbound manufactured products are much greater from Charlotte, N. C., to destinations in Official Territory than those of Official Territory manufacturers, the complainant is at a great disadvantage. It alleges in effect that the assailed rates to Charlotte are unduly and unjustly preferential of manufacturers located at Chicago, Milwaukee and Waukegan, and prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act. The prayer of the complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., Canada, to Charlotte, N. C., and to make reparation on 136 carload shipments forwarded during the period from June 23, 1949, to February 10, 1952, as well as during the pendency of the proceeding.

The complaint (Appendix No. 2) and the record (r. 35, 90) show that the assailed rates are not *joint* rates applicable from the Canadian origins to Charlotte, N. C., but *combination* rates applicable to and from Newport, Vt., a United States port of entry on or adjacent to the international boundary, and, for all practical purposes, an international border point.

At the beginning of the initial hearing, counsel for the defendants suggested (r. 4-5) that for jurisdictional reasons the complaint should be limited to an attack on the rate [fol. 100] applicable from Newport, Vt., to Charlotte, N. C. However, the practitioner representing the complainant refused to so limit the complaint and it was thereupon heard as drawn.

On brief the defendants reviewed the record only to the extent necessary to show the clear lack of jurisdiction of the Commission to pass upon the issues which it purported to present, and took the position that on the pleadings and the record the Commission should find that it was without

jurisdiction to pass upon the issues sought to be presented, and that the complaint should be dismissed.

The report submitted by Examiner J. Edgar Snider read in part:

"At the hearing on this complaint, defendants suggested, in view of the fact that the rates from the Canadian origins to Charlotte were combinations to and from Newport, Vt., *a port of entry to the United States on or adjacent to the Canadian border*, that the complaint should be limited to the rates from Newport to Charlotte on the ground that otherwise this Commission would be without jurisdiction. Complainant's counsel refused to limit the complaint to the Newport factor for the reason that the allegation of unreasonableness was based on the measure of the joint rates maintained by defendants from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. The examiner therefore directed that the complaint would be heard as drawn.

"Under Section I of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable for those rates only, or they may participate in joint through international rates and become [fol. 101] jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.

"So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction.

"The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed." (Emphasis supplied.)

The report of the Commission, by Division 3, 288 I.C.C. 793, stated:

"At the hearing the defendants suggested that the complaint be limited to the rates from Newport to Charlotte, on the premise that otherwise this Commission would be without jurisdiction. The complainant refused to so limit the complaint, primarily because the allegations of unlawfulness were based in part on the measure of the joint rates *maintained by some of the defendants and other rail lines* on the same commodities from the same Canadian origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. *They may publish rates to or from the border*, in which [fol. 102] event they are answerable only for those rates, *or they may participate in joint international rates* and thus become *jointly* and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. *So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte.*" (p. 794) (Emphasis supplied.)

Notwithstanding that clear statement, the report stated:

"The evidence is clear that the complainant's competitors at Chicago, Milwaukee, and Waukegan are being unduly preferred to the undue prejudice and disadvantage of the complainant. There is no showing, however, with sufficient particularity to warrant an award of reparation, that the complainant has been

damaged by reason of any undue prejudice which may have existed in the past." (p. 796)

Whereupon it stated:

"We conclude that the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered." (p. 796)

An order by Division 3, dated May 25, 1953, noted that Division 3, having found in its report that the assailed rates on crude asbestos and asbestos fibre from Black Lake, Coleraine, and Thetford Mines, P. Q., to Charlotte, N. C., were, and for the future would be, unduly prejudicial to ex-
[fol. 103] tent that they exceeded or might exceed the joint rates that were or thereafter might be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and to Milwaukee, Wis., and ordered the defendants to cease and desist, on or before August 1, 1953, and thereafter to abstain, from practicing the undue preference referred to in the order, and to establish, on or before August 1, 1953, upon statutory notice and thereafter to maintain and apply rates, regulations, and practices which would prevent and avoid the undue preference referred to in the order.

By petition dated July 31, 1953, the defendants sought the reopening, oral argument and reconsideration of the proceeding. Upon consideration of the record and of the defendants' petition, the proceeding was reopened for oral argument and for reconsideration by order of the Commission dated April 5, 1954. By a series of orders the Commission modified its order dated May 25, 1953, and eventually stayed the effective date thereof pending disposition of the matter.

Although the complainant had replied to the defendants' petition seeking the reopening of the proceeding and vigorously opposed the granting thereof, stating that

"the record in this proceeding covers all pertinent facts, circumstances, and conditions, and the reopening of this proceeding would unduly delay adjudication of the complaint",

the complainant, with complete disregard for the provisions of Rule 101 of the Commission's General Rules of Practice, by petition dated May 17, 1954, sought "the further reopening of this proceeding for the purpose of rehearing and further hearing".

By order of the Commission dated July 30, 1954, the proceeding was reopened for further hearing.

[fol. 104] The reopened proceeding was subsequently assigned for hearing with the four additional complaints involved in these proceedings.

The complaint on behalf of Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division (Docket No. 31683), filed on December 6, 1954, assails the *combination* rates applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to North Charleston, S. C. The complaint alleges that the complainant and its competitors receive crude asbestos and asbestos fibre from the specified origins. It alleges that the assailed rates to North Charleston, S. C., cause undue and unreasonable prejudice to the complainant, and undue and unreasonable preference and advantage to its competitors in Official and Western territories. The assailed rates are alleged to be unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial, in violation of Section 3 thereof. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins specified to North Charleston, S. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof.

The complaint on behalf of the Thermoid Company, Southern Division (Docket No. 31684), filed on December

6, 1954, assails the combination rates applicable on crude asbestos and asbestos fibre from Danville, St. Malachie, and Warwick, P. Q., to Charlotte, N. C. The complaint alleges that the complainant and its competitors receive crude asbestos and asbestos fibre from the specified origins, and that the assailed rates are excessive, unjust and unreasonable, unduly prejudicial to the complainant and [fol. 105] unduly preferential to its competitors in Official and Western territories, in violation of Sections 1 and 3 of the Interstate Commerce Act, respectively. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins named to Charlotte, N. C. No reparation is sought by that complaint.

The complaint on behalf of the Union Asbestos and Rubber Company (Docket No. 31685), filed on December 13, 1954, assails the *combination* rates and charges applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Marshville, N. C. The complaint alleges that both the complainant and its competitors receive crude asbestos and asbestos fibre from the Canadian origins named. It alleges that the assailed rates were and are unjust, unreasonable, unduly prejudicial to the complainant and unduly preferential of its competitors in Official and Western territories, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of this complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from the Canadian origins named to Marshville, N. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof.

The complaint on behalf of the Carolina Asbestos Company (Docket No. 31686), filed December 13, 1954, assails the *combination* carload rates applicable on crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and as-

bestos waste, from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Davidson, N. C. It alleges tha [fol. 106] both the complainant and its competitors receive crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste, from the Canadian origins named. The assailed rates are alleged to be unjust, unreasonable, unduly prejudicial to the complainant and unduly preferential of its competitors in Official and Western territories, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of the complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts and asbestos waste, from the Canadian origins named to Davidson, N. C., and be required to make reparation on shipments forwarded during the statutory period preceding the filing of this complaint, as well as during the pendency thereof.

In the Report of the Commission decided May 7, 1958, the Commission found that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, the specific rates set forth therein to the considered destinations.

The Commission further found that the rates on crude asbestos, asbestos fibre and asbestos refuse, shorts and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, Pa., and destinations taking the same rates by the specific amounts set forth therein.

[fol. 107] The Commission further found that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts,

and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

The Commission further found that the complainants in Dockets Nos. 30846, 31683, 31685, and 31686 were damaged and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases therein found to have been just and reasonable.

The report specifically provided for the addition of the applicable general increases authorized on and subsequent to March 12, 1951, to all of the rates resulting from the findings therein.

I

The Report of the Commission Is in Error as to Matters of Law.

The legal principles involved in these proceedings are of such importance from the standpoint of both the Canadian and the United States lines affected thereby that they have no alternative but to seek reconsideration of the Report of the Commission in the hope that they may thereby avoid any necessity for court litigation with respect thereto.

[fol. 108] A. The report is in error on the issue of jurisdiction.

The petitioners have not heretofore challenged, nor do they here challenge, the jurisdiction of the Commission over common carriers which, within the United States, en-

gage in the transportation of international traffic, nor over the transportation of such traffic insofar as such transportation takes place within the United States.

The petitioners concede that under the provisions of Section 1 of the Interstate Commerce Act the Commission has jurisdiction over common carriers engaged in the transportation of persons and property from or to any place in the United States to or from a foreign country, as well as over the transportation of such passengers and property, insofar as such transportation takes place within the United States. The basic issue to be decided is what constitutes transportation within the United States in a factual situation such as here exists.

It is also well settled by numerous decisions of the Commission and the courts that United States railroads have a clear alternative with respect to their participation in international traffic. They may publish reasonable and lawful rates applicable to and from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and become jointly and severally liable for any unlawfulness found in such rates. *Elliott Packing Co.* v. *Duluth, W. & P. Ry. Co.*, 292 I.C.C. 12, and *Thermoid Company, Southern Division* v. *Baltimore & O. R. Co.*, 288 I.C.C. 793. Petitioners continue to contend that United States ports of entry are, for all practical purposes, international border points and that having published rates on the involved commodities from East Alburgh and Newport, Vt., the ports of entry through which this particular traffic moves, they have complied with the first alternative above mentioned. They further contend that for the purpose of administer-
[fol. 109] ing the Interstate Commerce Act a reasonable and proper construction of the statute would require the Commission to hold, as it has for years, that the United States ports of entry are on or adjacent to the international border which are the nearest points to the border where the traffic can be interchanged between the United States and Canadian lines, for all practical purposes, in fact border points and that for the purpose of administering the Act insofar as it applies to common carriers and transportation subject to the provisions of the Act, its jurisdiction attaches

to such carriers and to such transportation at the ports of entry.

1. *History Of The Act.*

Prior to the enactment of the Transportation Act of 1920, the Interstate Commerce Act as amended by the Mann-Elkins Act which became effective June 18, 1910, applied, in the case of international traffic, to common carriers engaged in the transportation of passengers or property "from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country."

Although the Supreme Court had stated in *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 212, that "it would be difficult to use language more unmistakably signifying that Congress had in view the whole field of commerce (excepting commerce wholly within a State) as well that between the States and Territories as that going to or coming from foreign countries", the Commission itself admitted in *International Paper Co.* v. [fol. 110] *D. & H. Co.*, 33 I.C.C. 270, 273, that the first section of the Act did not in the same terms confer specific regulatory power on the Commission over rates from an adjacent foreign country to the United States as from the United States to an adjacent foreign country.

So far as the legislative history of the Transportation Act of 1920 indicates, the sole purpose for the change in the language of Section 1 made by that Act was to remove any uncertainty as to the regulatory power of the Commission in that respect.

When the Transportation Act of 1920 was under consideration in Congress, Mr. Edgar E. Clark, Member of

the Interstate Commerce Commission, appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Congress, First Session, and stated in part as follows:

> "The second change in section 1 is found at lines 12 and 13 on page 2 of the bill which makes the terms of the act applicable also to traffic 'from an adjacent foreign country to any place in the United States'.
>
> "For some reason that traffic is omitted from the provisions of the present act. It is not our thought that that will confer upon the Commission, or carry the terms of the act as applicable to jurisdiction over rates from specific places in an adjacent foreign country to places in the United States. *It is a general provision that* puts that transportation under the provisions of this act and *makes entirely clear in the statute what we have uniformly held—that we had jurisdiction of that transportation in so far as it was performed within the confines of the United States,* and that if the carriers should persist in maintaining a joint through rate which we found to be unduly prejudicial or unjustly discriminatory, we had the power to require the carrier operating within the United States to withdraw its concurrence from that [fol. 111] joint through rate and establish a reasonable proportional or other rate for the transportation from the boundary to destination in the United States." (Hearing on H. R. 4378, beginning with p. 10, July 15, 1919).

The Transportation Act of 1920 accordingly changed the language of Section 1 of the Act to provide for its application to common carriers engaged in the transportation of property "from or to any place in the United States to or from a foreign country, but only insofar as such transportation * * * takes place within the United States", and also by providing that the provisions of the Act shall apply to the transportation of property "but only in so far as such transportation * * * takes place within the United States."

2. *Principles Of Statutory Construction.*

The principles of statutory construction which should govern the construction and interpretation of the clause of the statute which limits the jurisdiction of the Commission with respect to international traffic to common carriers and transportation taking place within the United States are few and simple.

Under a strict, literal, unrealistic, and impracticable construction of that part of Section 1 of the Interstate Commerce Act the jurisdiction of the Commission could be held to attach to common carriers and to the transportation of property at the very point of the international boundary, regardless of whether the boundary is located in the middle of the Detroit River, for example, or in a relatively undeveloped region. Under a practical, more realistic and reasonable construction of that language the jurisdiction of the Commission should be held to attach to United States common carriers serving the ports of entry on or adjacent to the international border, which are the nearest points to the border where the traffic can be [fol. 112] interchanged between the United States and Canadian carriers, and to the transportation of property between those ports of entry and interior points within the United States.

As the Commission itself observed in *Hastings Commercial Club* v. *C., M. & St. P. Ry. Co.*, 69 I.C.C. 489, 493, every statute should be construed with reference to the object intended to be accomplished by it, and the statute should be given that construction best calculated to advance that object.

In *Piedmont & Northern Ry.* v. *Comm'n*, 286 I.C.C. 299, 311, the Commission itself stated that the Act was remedial legislation and should, therefore, be given a liberal interpretation.

In *Inland Waterways Corp.* v. *Alabama G. S. R. Co.*, 151 I.C.C. 126, 140, the Commission stated:

> "* * * The statute law which we administer in the regulation of rates is remedial in character, it is generally expressed in broad language, and it is to be broadly and liberally construed, having in mind the

purposes which it was intended to accomplish. *It is not difficult gradually to import into these provisions, by interpretation and precedent, a narrowness and rigidity which were not intended to be there. This we should guard against.*" (Emphasis supplied.)

It might be noted in passing that the construction by the Commission of the provision of the statute here under consideration obviously reflects the very narrowness and rigidity which the Commission itself has said it should guard against.

In *Construction of the Word "Deficit"*, 66 I.C.C. 765, 771, the Commission itself stated that the basic principle underlying all rules of statutory construction is that the [fol. 113] purpose, the intent of the lawmaker constitutes the law. It also stated (p. 771) the rule thoroughly established that if a word or phrase is susceptible of two constructions, one of which will effectuate the evident purpose of the statute and one of which is inconsistent or in conflict with that purpose, the former must control. Citing *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18.

In *Barrett* v. *Van Pelt*, 268 I.C.C. 85, 90-91, the Commission said:

> " * * * The intention of the law-maker constitutes the law. *Stewart* v. *Kahn*, 11 Wall. 493, 504. See *Smythe* v. *Fiske*, 23 Wall. 374, 380. Being satisfied of the legislative intention, the court will not be prevented from giving that intention effect by a too rigid adherence to the very word and letter of the statute. *Oates* v. *National Bank*, 100 U. S. 239, 244. Having found that the word 'damage' was intended to be used, the court applies the rule that, 'A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter, and a thing which is within the letter of a statute, is not within the statute, unless it is within the intention of the makers.' *People* v. *Utica Insurance Co.*, 15 Johns, 358, 381; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212."

The Supreme Court itself has stated that all laws are to be given a sensible construction, and that a literal applica-

tion of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose. *United States* v. *Katz*, 271 U. S. 354; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *United States* v. *Palmer*, 3 Wheat. 610, 631; *United States* v. *Ryan*, 284 U. S. 167, 175. As a matter of fact, the Commission itself quoted that statement of principle in *S. H. Kress & Co.* v. *Agwilines, Inc.*, 246 I.C.C. 655, 657.

[fol. 114] Years ago the Commission itself observed that transportation is a very practical public service and that the laws for its regulation were intended to deal with actual rather than with constructive or imaginary things. *St. Louis Terminal Case*, 34 I.C.C. 453, 465.

In *Texas & Pac. Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 234, the Supreme Court stated that in the exercise of its jurisdiction the Commission may and should consider the legitimate interests of the carriers and not just those of shippers and receivers using their services. It stated that the spirit and letter of the Interstate Commerce Act require that the Commission have in view the purpose of promoting and facilitating commerce and the welfare of all to be affected thereby, the carriers, as well as shippers and receivers.

3. *The Previous Construction By The Commission.*

Petitioners respectfully submit that the reasonable construction of the Commission's jurisdiction over common carriers engaged in transporting international traffic and over that transportation is one which has been recognized by the Commission itself and generally applied in situations of this kind almost from the date of the original enactment of the statute.

In *Carey Mfg. Co.* v. *G. T. W. Ry. Co.*, 36 I.C.C. 203, 206, a proceeding incidentally involving rates on asbestos from Robertson, Thetford, and Sherbrooke, the Commission stated:

> "* * * we can not prescribe joint through rates from Canada into the United States, but *we can control the rates which the American lines charge from the ports*

of entry in the United States to destinations in the United States, whether they are joint rates or separately established rates applicable to the through transportation. *Our jurisdiction attaches at the ports* [fol. 115] *of entry in this country,* and consequently we may pass upon the complaint of unjust discrimination here made as if the traffic in question originated at Detroit and Port Huron." (Emphasis supplied.)

In *Big Basin Lumber Co.* v. *S. P. Co.*, 37 I.C.C. 730, the Commission was called upon to consider, among other things, the lawfulness of rates on lumber from a point in Mexico to destinations in the United States, subject to a three-way combination rate made up of a local rate to the Rio Grande, a bridge charge, and an American factor applicable from El Paso. The Commission there stated (p. 737) that it was without power to pass upon the reasonableness of the rate from Madera to El Paso. In other words, without saying so, the Commission was there finding that for all practical purposes El Paso was an international border point.

In *Arizona Lumber & Timber Co.* v. *A. E. R. R. Co.*, 96 I.C.C. 203, the Commission was called upon to consider rates on lumber articles from points in the United States when destined to points in Mexico. There again Waco and Nogales, Arizona, were treated, for all practical purposes, as international border points. The Commission stated (p. 206) that *the factor within the United States* had not been shown to have been unreasonable and conceded it was without power to award reparation with respect to the charges which accrued to the Mexican line.

In *Watab Paper Co.* v. *Canadian N. Ry. Co.*, 152 I.C.C. 265, the Commission was called upon to consider the lawfulness of rates on pulpwood from Vassar and Sprague, Manitoba, to Sartell, Minn. The report indicates that the Canadian National interchanged that traffic with the Great Northern at Warroad, Minn., "approximately 6 miles south of the Canadian border". There were no joint rates from Vassar and Sprague to Sartell. In its decision the Commission said:

[fol. 116] "The interstate commerce act applies to the lines that carry, and to the transportation of, shipments from the international boundary to destinations in the United States, and it is the duty of carriers to establish reasonable rates for that service. Where railroads in the United States and in Canada unite in the establishment of a *joint* through rate from a point in Canada to a destination in the United States, and the United States carriers fail to establish a rate for the movement from the international boundary, we have jurisdiction to determine the reasonableness of the *joint* through rate which shippers were compelled to pay, and to award reparation against the United States carriers participating in the transportation. *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179.

"Where the rates from a point in Canada to a destination in the United States is based on a combination of the rates to and from *a border point within the United States*, our jurisdiction ordinarily extends only to the rates within the United States." (p. 268)

According to the report (p. 265) Warroad, the "border point within the United States", is six miles south of the actual border. Although the report does not so specifically indicate, presumably Warroad was a United States port of entry.

In *Thannhauser & Co.* v. *Southern Pac. Co.*, 159 I.C.C. 747, a proceeding involving rates on paper-bag linings from San Francisco, Calif., to destinations in Mexico, the Commission treated Nogales, Arizona, as an international border point for all practical purposes, and stated that it was without authority over the Mexican factor and that the only question to be determined was whether *the American factor* was unreasonable.

In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, the Commission was asked to prescribe reasonable rates for the future on fruit from points in Florida [fol. 117] "to Rouses Point, N. Y., and other international border crossings" on shipments destined to Montreal. The Commission there stated (p. 524):

"The factor of the combination rate applicable *from Rouses Point at the border* to Montreal and used to make up the lowest combination basis is published and on file with us but is not subject to the provisions of the act." (Emphasis supplied.)

M. Crelinsten & Sons v. *Railway Exp. Agency, Inc.*, 201 I.C.C. 284, involved the lawfulness of the rates on strawberries from Florida origins to Montreal, Quebec, the United States ports of exit being "Rouses Point, N. Y., or Highgate Springs, Vt., points a few miles south of the international boundary." The assailed rates were joint international rates, but in passing upon the unreasonableness of the assailed rates the report shows that the Commission considered the combination of rates made over Rouses Point, N. Y., or Highgate Springs, Vt. It indicates that the assailed rates from the Florida origins were $5.18 and that the rate from Rouses Point to Montreal was $1.05, indicating according to the report that "the rates charged for that portion of the transportation within the United States were approximately $4.13", the difference between the assailed joint international rate and the rate from Rouses Point, the port of exit to Montreal. The report noted that practically all of the transportation north of Rouses Point and Highgate Springs was in Canada. It found the assailed rates unreasonable to the extent indicated therein for that portion of the transportation within the United States. The obvious practical effect of that finding was to consider and deal only with the measure of the charges applicable from the Florida origins to Rouses Point and Highgate Springs.

E. J. Stanton & Son v. *Atchison, T. & S. F. Ry. Co.*, 258 I.C.C. 315, involved rates on hardwood lumber from Los Angeles, Calif., to Canadian destinations. The report in- [fol. 118] dicated (p. 317) that no joint international rates were provided for application from Los Angeles to Trenton, Sarnia, Ont., and Weymouth, Nova Scotia. Rates applicable from Los Angeles to Port Huron, Detroit, Buffalo and Rouses Point apparently reflected the applicable American factor. The Commission then said (p. 318):

"These *rates to the border points* were published to apply on that port of the through transportation to destinations in Canada *which takes place within the United States.* Carriers may publish reasonable rates *applicable to the international boundary,* in which event they are answerable only for those rates. *Cyanamid and Cyanide From Niagara Falls,* 155 I.C.C. 488, 491.". (Emphasis supplied.)

Hoffman-Taff, Inc. v. St. Louis-S. F. Ry. Co., 279 I.C.C. 710, involved combination rates from Canadian origins to Springfield, Missouri, the first factors of which applied to Detroit and Port Huron, Michigan. In that proceeding the Commission stated (p. 712):

"On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on *Detroit and Port Huron,* which for all practical purposes are international-border points, applied. Only the Canadian rates, as factors of the through combinations, are assailed. The defendants operating within this country are not answerable for those rates, but only for *the rate from the border points to destination* and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction. See *Canada Glue Co.* v. *Canadian National Rys.,* 253 I.C.C. 801 (not printed in full)." (Emphasis supplied.)

Dow Chemical Co. v. *Alton & S. R.,* 284 I.C.C. 365, involved rates on ethylene oxide from Texas to Sarnia, [fol. 119] Ontario, Canada, the rates involved being based on combinations of rates to and from Port Huron. The Commission there held (p. 370) that in such instances it might determine only the lawfulness of the factor applicable to the haul within the United States, citing *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co., supra.* According to the report, Port Huron is not on the international boundary but merely "the last station in the United States on the route of movement."

Admittedly, the Commission there awarded reparation on shipments to Sarnia "insofar as the transportation took place in the United States", but a careful reading and analysis of the report will indicate that what the Commission in fact did there was to award reparation on the Sarnia shipments by in effect finding unlawful the measure of the rate applicable to Port Huron.* That is obvious because the rates on which reparation was awarded reflect the rates to Midland, Mich., an American destination likewise involved in the complaint, and the rates to Port Huron, Mich., "the last station in the United States on the route of movement."

Elliott Packing Co. v. *Duluth, W. & P. Ry. Co.*, 292 I.C.C. 12, involved rates on shipments of horses from various Canadian origins to Duluth, Minn. The report indicates that combination of rates made over the international border applied without indicating whether the rates applied to and from United States ports of entry or to and from the actual international boundary. The report held (p. 13) that the Commission was without power to determine the applicability or reasonableness of the rates or charges from the Canadian origins to the border points, that transportation not being subject to the provisions of the Interstate Commerce Act.

[fol. 120] *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 U. S. 785, involved fresh fruits and vegetables from points in the South to Montreal, Que., the applicable rates being combination rates made over Rouses Point, N. Y. In that proceeding the Commission regarded Rouses Point, although south of the international boundary line, as "the international border" and said:

> "The jurisdiction of this Commission over international traffic is limited to such transportation only insofar as it takes place in the United States. We have no jurisdiction over that portion of the transportation from the international boundary to Montreal. It is well settled that railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates

* As it had in the *Crelinsten* case, *supra*.

applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654. The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." (p. 787)

Endicott-Johnson Corp. v. *Akron, C. & Y. R. Co.*, 300 I.C.C. 373, involved rates on hides, including certain international rates, and there the Commission said.

"Rates assailed to points in Canada are combination rates, composed of factors applicable to Northgate and Portal, N. Dak., which are international boundary points, and to factors for transportation beyond, in Canada. Our consideration must be confined to the rate factors for the movements within the United States." (p. 384)

[fol. 121] Northgate and Portal, N. Dak., both being within the United States, can hardly be precisely on the boundary line.

Conrad Fafard, Inc. v. *Canadian National Rys.*, 302 I.C.C. 163, involved shipments of straw from Canadian origins to United States destinations. In that report the following appears:

"The defendant Canadian National Railways appeared specially and moved that the complaints as to that carrier be dismissed for lack of jurisdiction. The shipments originated by the petitioner and by the other Canadian carrier defendant, the Canadian Pacific Railway Company, were interchanged with domestic carriers at either Port Huron or Detroit, Mich., which interchange points have been regarded by this Commission for all practical purposes as the international boundary. *Hoffman-Taff, Inc.* v. *St. Louis-*

S. F. Ry. Co., 279 I.C.C. 710. The motion is granted, and the complaints as to these carriers are dismissed." (p. 163)

As a matter of fact that limitation on its jurisdiction was apparently recognized and conceded in the prior report in the title case, 288 I.C.C. 793, where the Commission stated:

"* * * Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; [fol. 122] *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. *So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte.*" (Emphasis supplied.)

4. *The Cases Relied On By The Commission.*

In rejecting the petitioners' contention that they had satisfied the first alternative hereinbefore referred to by publishing combination rates made over United States ports of entry in lieu of publishing joint rates for application on this traffic, the Commission concedes that although "in some instances" the Commission or divisions thereof "have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada", most of the cases have clearly indicated that its jurisdiction extends to or from the international boundary. Aside from the fact that the Commission has considered other ports of entry as much as six miles from the boundary as border points on traffic to or from Canada, the petitioners respectfully submit that the cases cited by

the Commission are either not in point or else are not inconsistent with or do not do violence to the construction of the statute contended for by them.

Larrowe Milling Co. v. *C., W. & L. E. R. R.*, 52 I.C.C. 145, involved a carload minimum weight applicable on shipments of dried beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey. It did not involve combination rates made over the international boundary or ports of entry south of the boundary. The statement there (p. 147) is that the extent of the Commission's jurisdiction as to traffic from Canada into the United States is limited to that portion of the haul performed within the United States.

Simpson Co. v. *G. T. W. Ry. Co.*, 129 I.C.C. 430, involved refrigeration charges on shipments of tomatoes [fol. 123] from Port Huron, Mich., to Toronto and Montreal. That proceeding did not involve combination rates made over the international boundary line or United States ports of entry south thereof. On the question of jurisdiction, the Commission merely stated (p. 431) that in numerous cases it had considered *joint* rates between Canada and the United States, found them unreasonable and awarded reparation against the United States lines for the full amount of the damages sustained.

Newsprint Paper to Detroit, 161 I.C.C. 637, involved the lawfulness of joint rates on newsprint paper from Canadian origins to Detroit, Mich. It did not involve combination rates made over the international boundary or United States ports of entry south thereof. In that proceeding the Michigan Central admitted its failure to publish a rate to apply to a two or three mile movement from the international boundary in the middle of the Detroit River to the point in Detroit at which the shipments were delivered was a violation of Section 6 of the Act, an admission which gave the Commission jurisdiction to determine whether the complainant had been injured by such violation and, if so, to award damages resulting therefrom.

As the Report of the Commission concedes, *Control of Hereford Ry.*, 99 I.C.C. 7, was an abandonment proceeding and not one concerned with the matter of rates.

Fruit Importers v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, involved rates on vegetables from Florida origins to Montreal, Que. Most of the rates involved in that proceeding were joint commodity rates and not combination rates made over United States ports of exit or Canadian ports of entry, or over the international boundary. In a few instances the involved rates were combination rates made over Rouses Point, N. Y. The jurisdictional issue raised in that proceeding was confined (p. 143) to the Commission's right to pass upon the lawfulness of the joint rates in [fol. 124] effect prior to December 6, 1932, and that proceeding merely held that the Commission had jurisdiction to determine the lawfulness of the joint rates applied, regardless of whether or not local rates as such were published and maintained for transportation within the United States to the Canadian border.

Status of Napierville Junction Ry. Co., 266 I.C.C. 471, was a proceeding instituted on the Commission's own motion solely for the purpose of determining whether the Napierville Junction Railway was a common carrier subject to Part 1 of the Interstate Commerce Act. It did not involve the lawfulness of any rates, joint or combination, applicable on traffic transported by that carrier, and the Commission merely found the Napierville Junction Railway Company was not a common carrier subject to Part 1 of the Interstate Commerce Act.

Iron Or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario, 294 I.C.C. 515, was an investigation and suspension proceeding involving joint rates which the respondents proposed to publish for application on iron and steel wire from Black Rock and Buffalo, N. Y., to Kitchener, Ont. It did not involve combination rates made over the United States ports of exit or Canadian ports of entry, or over the international boundary. In that proceeding the respondents suggested that because the length of haul within the United States to the Canadian border was only 6.4 miles, compared with a haul of approximately 122 miles from the Canadian border to the destination, the Commission should not disturb the rates. The Commission merely held (p. 516) that it is the Commission's duty to determine

whether a rate published *jointly* with a foreign carrier was or is lawful where that issue is appropriately raised.

From the above it will be seen that none of the cases cited in the Report of the Commission is inconsistent with, or does violence to, the construction of the statute urged by the petitioners. Neither is there anything in *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. [fol. 125] 15, cited on Sheet 15 of the Commission's Report which would preclude the adoption of the construction of the statutory language urged by the petitioners. The initial report of the Commission in that proceeding, 278 I.C.C. 369, indicates (p. 371) that the proceeding involved joint rates applicable on refuse screenings and oat screenings from Vancouver, British Columbia, to destinations in California, Oregon and Washington, and that none of the shipments moved on combination rates made over international border points. In all instances the assailed rates were (p. 377) either joint rates or combination rates based on interior points in the United States.

The Report of the Commission on Reconsideration held (p. 18) that on the traffic there involved the United States defendants had elected to join in the publication of joint rates, and that as the charging of an unreasonable rate is a tort for which the parties to such rate are jointly and severally liable, the defendant United States carriers subject to its jurisdiction were liable for the full amount of any reparation due under the rates assailed.

The report of the Commission seems to imply that the decision in these proceedings does not represent a departure from any established principle laid down in prior decisions. That any such implication is wholly contrary to the fact is clearly established by the numerous cases hereinbefore cited which show that the Commission has heretofore consistently adopted the construction contended for by the petitioners in cases where the issue was raised. As a matter of fact, within the last seven months, the Commission has adhered to the construction contended for by the petitioners, as the reports in the *Endicott-Johnson* and *Conrad Fafard*, *supra*, cases plainly show, the former being a report by the entire Commission and the latter by Division 3.

[fol. 126] 5. *The Commission's Prior Concern Over This Issue.*

That the Commission itself has heretofore recognized the impracticality, if not the complete invalidity of the construction of the statute, now made in the instant report, as well as the absurd and impractical results such a construction must inevitably lead to, is clear from a review of some of its prior decisions.

In *Rates on Soda Ash and Other Commodities*, 28 I.C.C. 613, an investigation and suspension proceeding, the Commission was called upon to consider proposed increases in rates on soda ash from Wyandotte, Mich., to various destinations in Canada. In that report the Commission said:

> "It would seem that the underlying question in this case is how far this Commission should go in dealing with these rates from Wyandotte to Canadian points. Wyandotte is on the American side of the Detroit River, and the only movement of this commodity upon American soil is that to and upon that river. The bulk of the movement is in Canadian territory and subject to the jurisdiction of the Canadian commission." (p. 614)

The report also stated:

> "We are given jurisdiction over traffic from a point in the United States to a point in Canada, and we may undoubtedly act upon the American lines over which we have jurisdiction to a certain extent in case of such rates. It is doubtful if we could require our American lines to establish and maintain for the future a rate to Canadian points. We can require them to maintain rates which are now in effect until some affirmative action is taken by some Canadian line, over which we have no control, which prevents the continuance of those rates, or until the Canadian commission has [fol. 127] acted in the premises. And this, we think, is the course which should be adopted in the present instance." (pp. 614-615)

In *International Paper Co.* v. *D. & H. Co.*, 33 I.C.C. 270, the Commission was called upon to consider the alleged unlawfulness of joint rates on pulp wood from Canadian origins to destinations in New York. The report noted that the D. & H. received the traffic there involved from its Canadian connections at Rouses Point, N. Y., "about one mile south of the international boundary line", and that the New York Central received the traffic from its Canadian connection at Massena Springs, N. Y., "about 20 miles from the boundary line via the route of movement", although the air-line distance from Massena Springs to the boundary was about six miles.

The Commission noted (p. 273) that the first section of the Act did not in the same terms confer specific regulatory power on the Commission over rates from an adjacent foreign country to the United States as from the United States to an adjacent foreign country. It cited *T. & P. Ry. Co.* v. *I.C.C.*, 162 U. S. 197, as authority for the statement that its jurisdiction over carriers by railroad in the United States subject to the Act included all of their lines within the boundaries of the United States regardless of where the freight carried originated. However, the report stated that the Commission could not require the maintenance of joint rates from Canada into the United States, nor control the charges that carriers in Canada might make for transportation services in that country. It stated that the Commission might require the defendants to cease and desist from continuing the joint rates complained of and to establish their own rates for the service within the United States, in which event traffic would move on combination rates.

The report then continued:

> "Joint rates from and to Canada are a convenience to the public and to the carriers. They tend to pro- [fol. 128] mote easy and prompt movement of traffic and should be continued unless they are unreasonable or otherwise unlawfu.. *We do not conceive that merely because the rates are published as joint through rates we have power to determine what the railroads of Canada shall charge for transportation of freight to the border.*

"We think that in view of the fact that in practically every instance the entire increase accrued and accrues to the Canadian carriers for service performed within Canada, and of the further fact that the rates are published by Canadian carriers which are, therefore, primarily responsible for them, the Board of Railway Commissioners for Canada was the proper tribunal to pass upon the reasonableness of these rates. The Canadian Board's finding in a matter properly coming before it is entitled to weighty consideration. *The Canadian Board has held that it should not consider the reasonableness of joint rates from points in the United States to points in Canada, published by United States carriers and concurred in by Canadian carriers. It has taken the position that this Commission, having jurisdiction over the carriers primarily responsible for the making and publication of such rates, is the proper tribunal to consider the reasonableness thereof. Continental Prairie & Winnipeg Oil Co.* v. *C. P. Ry. Co.*, 13 Can. Ry. Cas., 156; *C. N. Ry. Co.* v. *G. T. Ry. Co.*, 10 Can. Ry. Cas., 139.

"The Canadian carriers and the Canadian Board have taken affirmative action with respect to the rates here under consideration. *Rates on Soda Ash and Other Commodities, supra.* The Canadian Board reached its decision after full hearing and due consideration. Under such circumstances we are not inclined to require the carriers subject to our jurisdiction to withdraw their concurrences in the rates." (p. 274) (Emphasis supplied).

[fol. 129] In *Payment of Charges in United States Currency*, 59 I.C.C. 263, an investigation and suspension proceeding involving the payment of charges in United States currency and the prepayment of charges on shipments into Canada, the Commission said:

"Our jurisdiction over transportation to or from a foreign country is limited to that part of the transportation which takes place within the United States. Interstate Commerce Act, section 1, paragraph (2);

International Paper Co. v. D. & H. Co., 33 I.C.C., 270. We can not, therefore, undertake to pass upon the proposed rules in so far as they affect charges for transportation beyond the borders of the United States, but will leave their validity and propriety to be determined under the laws in force where the transportation takes place." (p. 264) (Emphasis supplied).

Cyanamid and Cyanide From Niagara Falls, 151 I.C.C. 207; an investigation and suspension proceeding, involved the lawfulness of joint rates on cyanamid and crude cyanide from Niagara Falls, Ont., to various destinations in the United States. The Commission, by Division 4, found that the Commission was without jurisdiction in either a complaint or suspension proceeding to consider the lawfulness of *joint* rates or proposed *joint* rates between points in the United States and points in Canada, except (a) for the purpose of ascertaining damages sustained in consequence of a breach, by the carriers subject to our jurisdiction, of their statutory duty to make and publish just and reasonable rates applicable to that part of the transportation within the United States, and except (b) that it might require the carriers subject to its jurisdiction to establish and maintain for the future just and reasonable rates applicable to that part of the transportation within the United States.

[fol. 130] In reaching that conclusion the Commission relied on the decision of the Supreme Court in *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179. In its report the Commission said:

"It will be noted that the reparation which we awarded to the News Syndicate Company was for damages occasioned by the charging, by carriers subject to our jurisdiction, of an unreasonable rate for transportation only part of which was subject to our jurisdiction, and that the damages which the Supreme Court found that we had jurisdiction to award were for violation of the duties of carriers subject to our jurisdiction with respect to transportation wholly sub-

ject to our jurisdiction, that is, failure to publish a just and reasonable rate applicable to that part of the transportation within the United States.

"As we construe the language of the court quoted above *we may consider the lawfulness of an international joint rate only for the ascertainment of damages sustained in consequence of the breach by the carriers subject to our jurisdiction of their statutory duty to publish a just and reasonable rate applicable to that part of the transportation within the United States.* Accordingly it is our view that we are without jurisdiction to consider the lawfulness of an international *joint rate* for the future in either a complaint or suspension proceeding, except that we may require the carriers subject to our jurisdiction to establish and maintain for the future a just and reasonable rate applicable to that part of the transportation within the United States." (p. 212) (Italics supplied.)

In the Report of the Commission on Further Argument in *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, the Commission reviewed at some length its prior [fol. 131] decision and the decision of the Supreme Court in the *News Syndicate* case, and then said:

"We adhere to the view first expressed in *Black Horse Tobacco Co.* v. *I.C.R.R. Co.*, 17 I.C.C. 588, that the United States lines have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates. Or, they may become parties to joint rates covering the entire transportation, in which event they become jointly and severally liable for any unlawfulness in such rates. We have jurisdiction over the United States carriers. We have jurisdiction over a portion of the transportation. If in such circumstances the United States carriers enter into a joint undertaking and participate in a rate which is an entity, in respect of such transportation, we entertain no doubt that our control over them empowers us to require them to

> cease and desist from participating in an existing joint rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility." (pp. 491-492)

The Commission also pointed out that no action had been taken by the Canadian Commission with respect to the rate situation there involved, and that the only action taken by the Canadian carriers, over which the Commission had no control, had been forced upon them by the proposed withdrawal by the United States lines of their concurrences in the existing rates. The report then said:

> "It would be unfortunate, indeed, for us to abandon a jurisdiction which is grounded upon such an impos- [fol. 132] ing line of our own decisions. The doubt we have heretofore entertained in respect of our jurisdiction over *joint* international rates has been as to our power to award reparation. The Supreme Court having affirmed our jurisdiction over that question in the *News Syndicate* case, it would be most unwise to surrender our regulatory power over such rates upon a doubtful construction of certain portions of that affirming decision. On the contrary, we believe the better course is to continue, as we have in the past, to exercise jurisdiction over the participation of United States lines in existing joint rates, or the propriety of such rates proposed as a substitute for existing rates. This will be our policy until we are compelled to abandon it by a decision of a court of competent jurisdiction on the direct question." (p. 493) (Italics supplied.)

In a concurring opinion, Commissioner Eastman concurred "in the results reached in this case, although not with all that is said in support of those results, so far as the jurisdictional question is concerned". Commissioner Eastman said:

Prior to the *News Syndicate case* we had asserted jurisdiction over the lawfulness of international rates under both sections 1 and 3, for the purpose of determining whether United States railroads should be required to cease and desist from participating in such rates if we found them to be unlawful, and in the latter event for the further purpose of determining whether the United States carriers should be required to pay reparation for damages suffered because of the tortious character of the rates. This doctrine clearly was not sustained in the *News Syndicate case*, although it may not have been wholly repudiated. The court there held that it is the duty of United States railroads, under section 1(5) and section 6(1) and (7) of the interstate commerce act, [fol. 133] to establish just and reasonable rates for service to or from the international boundary. For the breach of this statutory duty they are liable in damages. It is our duty to ascertain the damages sustained, and to this end we have jurisdiction to determine the reasonableness of the through international charges exacted, which a shipper has been compelled to pay because of the absence of rates to or from the boundary. It will thus be seen that the court did not hold that we can award damages because of the unlawfulness of international rates under section 1, which was the theory on which we had proceeded, but because of the breach of statutory duty involved in the failure to publish just and reasonable rates to or from the boundary. For this purpose we have jurisdiction to inquire, not into the lawfulness of international rates, but into their inherent reasonableness.

"From this reasoning of the court I think that it is permissible to infer that we are without jurisdiction over international rates as such, our only jurisdiction over international traffic being to see to it that the United States railroads publish lawful rates to or from the boundary for the portion of the transportation which is within this country, and to award damages because of any breach of this duty on their part. Under this theory, United States railroads would

be free to participate in joint international rates as they see fit, and such rates would not be subject to our tariff rules or to our regulation in any other respect. They could be used by shippers as alternatives to rates to or from the boundary, and our only jurisdiction would be to inquire into their inherent reasonableness for the purpose of ascertaining damages if shippers were compelled to pay them because of the absence of rates applicable solely to the transportation within the United States.

"But while this theory is a permissible inference from the court's decision, I find myself in difficulties [fol. 134] when I come to consider its logical results. If we have no jurisdiction over international rates as such, this is true under section 3 as well as under section 1. Let us suppose, then, that the international rate is too low, as sometimes happens, and relatively lower than corresponding rates within this country for which the same United States carrier is in whole or in part responsible. Let us suppose, also, that this low level of the international rate results in injury to some United States shipper. Manifestly the establishment of a lawful rate from the boundary would not abate this injury so long as the low international rate remains as an alternative which the Canadian shipper may use. Are we to hold that this is an injury for which no remedy exists? The only practicable remedy is an order requiring the United States railroad to cease and desist from participating in the objectionable international rate. Upon further consideration it seems to me that we must have jurisdiction to make such an order, for there is no other way of exercising effective control over that portion of the international transportation which takes place within the United States, of which we plainly have jurisdiction.

"The situation is not so clear under section 1 as under section 3, but even under section 1 the theory outlined above leads us into difficulties. I see no escape from the conclusion, if this theory be sound, that there may be alternative rates applicable to the same international movement; namely, a joint rate and

a combination rate on the boundary. This in itself is an unreasonable situation likely to prove embarrassing and even injurious to shippers. Upon consideration, it seems to me that the only way in which we can effectively exercise control under section 1 over that portion of the international transportation which takes place within this country is to provide that *United States railroads must either maintain just and rea-* [fol. 135] *sonable rates to and from the boundary, in which event they must not participate in alternative joint rates, or they must be parties to just and reasonable joint rates, in which event they need not maintain rates to and from the boundary because to do so would be a vain and useless thing.* Whether or not such an interpretation of our statutory powers and of the statutory duties of the United States carriers is consistent with the *News Syndicate case* I am not sure; but in all events there is sufficient doubt upon the point to warrant us in giving the Supreme Court an opportunity to consider further the subject of international rates." (pp. 500-502) (Emphasis supplied.)

Of significance also is the dissenting opinion of Commissioner Meyer, concurred in by Commissioner Woodlock, which read in part as follows:

"I can not concur in reversing division 4 for reasons stated in the original report of the division, 151 I.C.C. 207. In my judgment, what it is now proposed to do can not be done without performing one or more of the following unlawful acts:

1. *To legislate for a foreign country* by—

2. *Passing upon the reasonableness of rates in a foreign country when we have no authority to take evidence and to inform ourselves regarding the facts customarily relied upon in establishing reasonable rates.*

3. *To carry into a foreign country our United States standards of reasonableness and to apply them there.*

"Situations like those presented by the instant case can be fully met, without raising doubtful legal and

constitutional questions, *by requiring carriers to publish rates to and from international boundaries.*" (p. 503) (Emphasis supplied.)

[fol. 136] *Newsprint Paper Investigation*, 197 I.C.C. 738, was an investigation and suspension proceeding involving rates on newsprint paper, including joint rates, from Canadian origins to destinations in the United States. In the portion of that report devoted to the joint international rates there involved the following appears:

"The position of the Canadian carriers may be summarized as follows:

"Before either the Canadian board or this Commission was instituted there were joint international rates, some of the known ones dating back as far as 1874. These rates, they contend, were established under the right at common law of the two groups of carriers to contract with one another for the transportation of traffic in through cars and at through rates; and, it is argued neither our act nor the Railway Act of Canada destroyed the right of the carriers to make such contracts. As to the regulatory power of either commission they state that:

> In the final analysis, the jurisdiction of each commission rests in prescribing rates to or from the international boundary which, under all the circumstances and conditions in their respective countries, are just and reasonable. When, therefore, the Canadian and American carriers join together in publishing rates which are lower than either commission could find reasonable if based on the sum of the locals to and from the boundary, it is obvious that neither commission can enforce still lower rates in which the two sets of carriers shall join, if the carrier in the foreign country, over which such commission has no jurisdiction, declines to be bound by such rate. That is the situation in its broad aspect.

"They state that no serious difficulty in regard to international rates has arisen in Canada for the reason

that, moved by a realization that such rates, made for [fol. 137] the express purpose of fostering international trade, are generally lower than Canadian local rates or combinations on the boundary and that, because of its lack of jurisdiction over participating American carriers, any interference therewith probably would result in higher rates, the Canadian board has dismissed applications for reductions therein. They also state that the Canadian board has not adopted the practice of issuing cease-and-desist orders prescribing maximum rates in which Canadian carriers may participate." (pp. 774-775)

And:

"Maintenance of reasonable and nonprejudicial rates between the two countries is admitted by all parties to be a matter of the greatest importance and both the carriers and the shippers generally urge that we take no action which would compel or lead to the cancelation of *joint international rates* on newsprint. *Until we have a mandate from Congress or an interpretation by the courts of the present law necessitating a different course, we shall continue in the view that we should proceed with great caution in an effort to avoid any action which would tend to complicate or hinder the free movement of international traffic.*" (p. 776) (Emphasis supplied.)

And:

"Having in mind that the establishment of fair relations involves, to a certain extent, an evaluation of the service from Canadian producing points to the border, we will not at this time suggest what might appear to us to be proper joint through international rates or prescribe rates from the boundary for application on international traffic, but shall defer further consideration of the international rate situation *pending such action as the Canadian board* may consider appropriate and pending revision of the carriers' proposals as to [fol. 138] international rates in order to bring them

into reasonable harmony with the prescribed domestic bases." (p. 777) (Emphasis supplied.)

Consolidated Stone Cases, 200 I.C.C. 65, embraced a major portion of the stone rate adjustment east of the Rocky Mountains, together with *joint* rates from origins in Official Territory to destinations in the Canadian provinces, Ontario and east. In its report in that proceeding the Commission said:

> "It would appear that the rates to points in Canada are as much in need of revision as the rates within the United States. However, we do not have jurisdiction to prescribe joint rates for future application from points in the United States to points in Canada, and the only method open to us of preventing the application to such transportation of joint rates which are found to be unlawful under the act is to require the lines of the *United States to discontinue their concurrence therein. In the present state of the record we are not warranted in making specific findings which might ultimately lead to such drastic action.* On the contrary, it would appear that the most that should be done at this time is to suggest that rates from official territory to that portion of Canada here considered should be revised in appropriate relation to the basis approved herein for application within official territory." (pp. 113-114) (Emphasis supplied.)

Inland Empire Paper Co. v. *Great Northern Ry Co.*, 219 I.C.C. 501, involved the lawfulness of rates on newsprint paper, including certain *joint* international rates. In discussing international rates in that proceeding the Commission said:

> "* * * we observed in the *Newsprint* case, *supra*, page 776, that maintenance of reasonable and non-prejudicial rates between Canada and the United States was admitted by all of the parties therein to be a [fol. 139] matter of the greatest importance, and both the carriers and the shippers in that case urged that no action be

taken which would compel or lead to the cancellation of joint international rates on newsprint. We there said that until we have a mandate from Congress or an interpretation by the courts of the present law necessitating a different conclusion, we shall continue in the view that *we should proceed with great caution* in an effort to avoid any action which would tend to complicate or hinder the free movement of international traffic." (p. 511). (Emphasis supplied.)

6. *The Complete Practicality Of The Construction Contended For By Petitioners.*

International traffic coming into the United States moves through established ports of entry, some of which are coastal ports through which water-borne traffic moves to or from foreign countries. In the case of traffic from adjacent foreign countries, such traffic moves through ports of entry located either on the Great Lakes or at interior land points located a reasonable distance from the actual international boundary line. All such ports of entry are essential for Customs purposes. In addition, the ports of entry through which all-rail traffic to or from adjacent foreign countries moves serve as points where foreign lines, Canadian or Mexican, interchange traffic with United States lines.

Petitioners have heretofore shown that some Canadian traffic is interchanged at Rouses Point, N. Y., a port of entry located less than one-half mile from the international boundary. Yet, because the petitioners publish rates to and from that port of entry, which for all *practical* purposes is the international boundary so far as the importation of traffic by railroad is concerned, the Commission would hold [fol. 140] that a rate applicable from a point in Canada to a point just within the United States, no matter how close to the actual boundary line, would give it jurisdiction over the transportation as well as over the Canadian line performing that transportation.

The only apparent alternative the petitioners might have would be either to attempt to interchange all traffic at the exact international boundary, or to publish rates applicable to and from the exact international boundary. They have

heretofore shown that it would not be practicable or feasible to interchange traffic at the exact international boundary, but the Commission dismisses that practical consideration with the indifferent comment that it does not perceive how that would affect the situation. Neither would it be practicable to publish rates between interior points in Canada and the exact international boundary, on the one hand, and points between the exact international boundary and interior points in the United States, on the other. As the Commission well knows, the carriers rarely, if ever, publish rates for application to or from a point on a line of railroad where there are no facilities for the receipt, delivery, or interchange of traffic. Any departure from that practice could only result in complicated, confusing, and possibly doubtful or ambiguous tariff provisions. If the Canadian and American carriers continue to interchange traffic at the established ports of entry under the Commission construction of the statute in order to deprive the Commission of jurisdiction in any instance where the carriers elect not to join in joint international rates, it will be necessary for them to publish rates to and from the exact boundary line. In the case of traffic moving through the Rouses Point port of entry, for example, the Canadian National Railways would have to publish a joint rate for application from the actual international boundary to Charlotte, N. C., although it would participate in that rate only to the extent of a haul of less than one-half mile to Rouses Point, where the traffic [fol. 141] would thereupon be interchanged with its United States connection. Similarly absurd tariff and routing provisions would result in the case of any and all traffic moving via any other port of entry.

The petitioners have already shown that the Commission construction of the statute could not fail to result in conflict between the Canadian Board of Transport Commissioners and this Commission as to their respective jurisdiction over international traffic.

The attitude of the Canadian Government is indicated in a report of the Royal Commission on Transportation of Canada to Parliament, dated February 9, 1951, where, speaking both as to the Board of Transport Commissioners

for Canada and the Interstate Commerce Commission, it was observed:

> "The Board controls the rate over such portion of the through rate as lies within Canada and the Commission controls the rate over the portion in the United States.
>
> "The legal jurisdiction over such rates is thus divided, neither country having complete control over the entire rate in an international rate tariff." (p. 102.)

It should be noted that there are no known decisions of the Canadian Board of Transport Commissioners which held that the provisions of the Canadian statutes attach to a United States carrier entering Canada merely for the purpose of interchanging traffic with Canadian railroads.

On the other hand, the construction of the statute contended for by the petitioners would create no such interchange, tariff publication, or conflicting jurisdictional problems. It would permit Canadian lines to continue to interchange traffic with American lines at United States ports of entry, without thereby making themselves United States carriers subject to the provisions of the Interstate Commerce Act or giving the Commission jurisdiction over [fol. 142] the entire transportation regardless of the infinitesimal portion thereof performed by Canadian carriers in moving the traffic the slight distance between the international boundary and the various United States ports of entry. It would obviate any necessity for endeavoring to circumvent this Commission's jurisdiction by the highly impractical means of attempting to interchange traffic at the exact international boundary, or, in the alternative, publishing rates for application to the exact international boundary regardless of the complicated tariff situation which would inevitably result.

The following language of Justice Frankfurter in *United States* v. *Monia*, 317 U. S. 424, 431-432, seems particularly significant and appropriate here:

> "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification. It is a wooden English doctrine

of rather recent vintage (see Plucknett, A Concise History of the Common Law, 2d ed., 294-300; Amos, The Interpretation of Statutes, 5 Camb. L. J. 163; Davies, The Interpretation of Statutes, 35 Col. L. Rev. 519), to which lip service has on occasion been given here, but which since the days of Marshall this Court has rejected, especially in practice, e. g., *United States* v. *Fisher*, 2 Cranch 358, 385-86; *Boston Sand Co.* v. *United States*, 278 U. S. 41, 48; *United States* v. *American Trucking Assns.*, 310 U. S. 534, 542-44. A statute, like other living organisms, derives significance and sustenance from its environment, from which it cannot be severed without being mutilated. Especially is this true where the statute, like the one before us, is part of a legislative process having a history and a purpose. The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning."

[fol. 143] The Commission itself has up to this time been reluctant, if not entirely unwilling, to adopt the construction of the statute which it now does. Under the Commission construction of the statute the petitioners are in effect found to have failed to comply with their statutory obligation to publish just and reasonable rates for application from the international boundary to the involved destinations, and for the breach of that statutory duty to be liable for the resulting damages, if any. Under the petitioners' construction of the statute there would be no breach of their statutory duty and consequently no liability for damages.

The rule is thoroughly established that language is susceptible of two constructions, one of which will effectuate the evident purpose of the statute and one of which is inconsistent or in conflict with that purpose, the former must control. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 18.

The respondents respectfully submit that the Commission's failure to find that these complaints presented issues which it lacked jurisdiction to consider was error of law, which requires reconsideration and reversal.

B. THE REPORT IS IN ERROR AS TO THE JURISDICTION OF THE COMMISSION OVER CANADIAN LINES.

The Interstate Commerce Act admittedly gives the Commission jurisdiction over all common carriers engaged in the transportation of property by railroad insofar as such jurisdiction takes place within the United States. To the extent that any Canadian line operates within the United States beyond the United States ports of entry, the petitioners have heretofore conceded that those lines have for all practical purposes thereby become United States common carriers subject to the Act and to the jurisdiction of the Commission. However, simply because Canadian lines may be subject to the provisions of the Interstate Commerce [fol. 144] Act to the extent that they operate within the United States south of United States ports of entry, it does not follow that this Commission automatically has unlimited jurisdiction over those carriers and can effectively control, directly or indirectly, that portion of their operations which takes place wholly within Canada.

The territorial jurisdiction of the Commission extends to the international boundary line, at which point that of Congress itself halts. The Commission's territorial jurisdiction as to foreign commerce is thus co-extensive with that of the Federal Government. No act of Congress has force of law beyond that boundary line. *International Nickel Co.* v. *Director General*, 66 I.C.C. 627, 629. As the Commission said in *Cyanamid and Cyanide from Niagara Falls*, 155 I.C.C. 488 (p. 490):

> "The interstate commerce act, from which we derive our powers, by its terms is applicable to transportation 'from or to any place in the United States to or from a foreign country,' and to common carriers engaged in such transportation, '*but only in so far as such transportation takes place within the*

United States. Manifestly our jurisdiction must be so limited, for Congress could not confer upon us jurisdiction in respect of transportation wholly within a foreign country." (Emphasis supplied.)

As the defendants have shown in that portion of this petition under subdivision "A", the Commission heretofore has consistently indicated in similar instances that it has no control over the Canadian carriers.

In *Cyanamid and Cyanide from Niagara Falls, supra*, the Canadian carriers which entered the United States to effect interchange of the traffic with United States carriers were pointedly described (p. 492) as "Canadian carriers over which we have no control."

[fol. 145] In *Michelson v. Canadian National Rys.*, 256 I.C.C. 57, the Canadian line interchanged Canadian originated traffic with the Maine Central Railroad at Vanceboro, Me., the interchange being made south of the international boundary. The jurisdictional question was raised by the Canadian defendant, and the Commission awarded reparation (p. 60), against the United States carriers only. That the term "United States carriers" was not applicable to the Canadian defendant is shown by the omission of the Canadian defendant from the list of carriers set out in the corrected reparation order of the Commission in that proceeding, dated December 11, 1944.

In *Carstens Packing Co. v. Great Northern Ry. Co.*, 264 I.C.C. 164, the second corrected supplemental order of the Commission, dated April 11, 1949, eliminated the Canadian Pacific Railway which had been named in a prior order.

W. C. Reid & Co. v. B. & M. R. R., 276 I.C.C. 397, was a discrimination proceeding in which the Canadian National Railways was a defendant interchanging traffic at Vanceboro, Me. While holding that when carriers subject to its jurisdiction voluntarily joined in rates between points in the United States and points in Canada the Commission may require the *United States carriers* to abstain from joining in the maintenance of such rates on any basis other than that found lawful, the Canadian National Railways was not regarded as a "United States" carrier,

and was not named in the order directing the removal of the discrimination found in that proceeding.

Mayo Shell Corp. v. *B. & O. R. Co.*, 293 I.C.C. 77; 297 I.C.C. 133, involved traffic moving from Houston, Texas, to points in Canada on combination rates made over the border. While the reports do not clearly so indicate, the probabilities are that the combination rates referred to were made over ports of entry rather than over actual border points. In any event, the report of the Commission significantly noted that, while a portion of the transporta-
[fol. 146] tion under the assailed rates accrued in Canada and several of the defendants were Canadian carriers, the Commission had jurisdiction only over such of the transportation as took place within the United States. Its order accordingly was directed only against the defendant carriers engaged in that transportation and omitted the Canadian defendants.

In *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co., supra*, cited in the Commission's report in these proceedings, the Commission cited (p. 15) *Cyanamid and Cyanide from Niagara Falls, supra*, which omitted Canadian carriers from the order of the Commission, although interchange was effected at a point below the international boundary characterizing such carriers as "Canadian carriers over which we have no control."

Despite its previous clear admissions that in instances of this kind the Commission has no authority over the Canadian lines, this report of the Commission amounts to an assertion of jurisdiction over the Canadian carriers merely because those lines crossed the international boundary line for the sole purpose of interchanging the shipments with their United States connections at the several United States ports of entry, those ports of entry being only slight distances south of the actual boundary line between Canada and the United States, and being the points nearest to the actual boundary where interchange can be effected. Such a technical construction of the statute cannot be justified as a matter of law. It amounts to an assertion of the jurisdiction of this Commission over Canadian carriers and authority to regulate indirectly jurisdiction which takes place wholly within Canada.

C. THE REPORT AND ORDER OF THE COMMISSION AMOUNT TO THE PRESCRIPTION OF THROUGH INTERNATIONAL RATES.

The Report of the Commission concedes, as it must, that the Commission has no jurisdiction to prescribe international rates for application partly within Canada. The In- [fol. 147] terstate Commerce Act does not empower the Commission to prescribe or regulate joint international rates. It applies to international commerce only in so far as the transportation takes place within the United States. *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654. Whatever power Congress may have to regulate the conduct of United States railroads doing business abroad, by the limiting provisions of the Transportation Act of 1920, it expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries. Having expressed that purpose it certainly cannot be argued that Congress had by implication granted the Commission any power to regulate the conduct of foreign carriers and rail transportation in foreign countries. *U. S.* v. *Pennsylvania R. Co.*, 323 U. S. 612, 621.

Notwithstanding the concession in the report that the Commission has no jurisdiction to prescribe international rates for application partly within Canada, the Commission nevertheless has undertaken to do exactly that. The report not only finds that the assailed rates were and are unjust and unreasonable, but that they are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory. The finding of unjustness and unreasonableness relates to past shipments, and it is significant that the report is silent as to the rates which will be just and reasonable for the future, either from the Canadian origins involved, the actual international boundary line, or the United States ports of entry adjacent thereto which, for all practical purposes, should be considered as border points between Canada and the United States.

But the report further finds that the assailed rates are and will be unduly prejudicial to the complainants and unduly preferential to the complainants' competitors in Official Territory to the extent that the assailed rates from the several Canadian origins to the several southern desti-

nations exceed or may exceed the rates to Ambler, Pa., [fol. 148] and destinations taking the same rates, by specified amounts. That finding necessarily relates to the present and future, and it is equally significant that the report is silent as to whether the assailed rates were unduly preferential or prejudicial in the past.

Petitioners respectfully submit that the qualification of both findings by the restrictive clause taken from the statute, namely, "in so far as the transportation takes place within the United States" is nothing more than a superficial attempt on the part of the Commission to legalize findings which otherwise would be clearly unlawful.

The order of the Commission, dated May 7, 1958, which referred to the report in these proceedings and to the prior report in the title proceeding and made them a part thereof, noted that the Commission had in its report found the rates in question are and for the future will be unduly prejudicial to the complainants and unduly preferential to the complainants' competitors to the extent indicated in that report, and orders the defendants to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue preference and prejudice referred to. It further orders the defendants, according as they participate in the transportation within the United States, *to establish, on or before August 14, 1958, upon not less than thirty days' notice to the Commission and to the general public, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the order.* The petitioners respectfully submit that the order referred to amounts in effect to a prescription by the Commission of international rates which may lawfully be applied for the transportation of various types of asbestos moving from origins in Canada to destinations in the United States. The petitioners respectfully submit that the order is clearly a prescription of international rates in direct conflict with the Commission's admitted lack of "jurisdiction to prescribe rates for application partly [fol. 149] within Canada", and that the qualifying clause in the order directing compliance therewith by the defendants "according as they participate in the transportation

within the United States" is nothing more than a futile effort to circumvent the statutory limitation on the power of the Commission by attempting to accomplish by indirection what the Commission clearly cannot do directly.

Even if, contrary to the contentions hereinbefore made by the petitioners, the Commission has jurisdiction to consider the assailed rates, the extent of the Commission's authority would be limited to the issuance of a cease and desist order requiring the United States carriers to discontinue the maintenance of rates properly found to be unlawful with respect to transportation wholly within the United States.

By fixing the exact measure of the rates which may lawfully be applied on this traffic from Canadian origins to southern destinations in the future, the Commission is prescribing rates on international traffic, and that it cannot do.

D. THE REPORT IS IN ERROR IN APPLYING A CHANGED CONCEPT OF COMMISSION JURISDICTION RETROACTIVELY.

The cases hereinbefore cited show beyond question that the Commission has consistently construed the Interstate Commerce Act as limiting its jurisdiction to rates which the United States lines publish and charge from or to ports of entry or exit located in the United States on or adjacent to the international border which are the nearest points to the border where the traffic can be interchanged between the United States and Canadian lines. It has consistently held that it has no jurisdiction over a Canadian factor of a combination rate even though that factor applies to the port of entry located on American soil.

The decision herein represents an extreme and abrupt departure from a settled administrative construction of the [fol. 150] Act. It is an established principle that "settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons" *New York, N. H. & H. R. Co.* v. *Interstate Commerce Commn.*, 200 U. S. 361, 401; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Interstate Commerce Commn.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178.

This is particularly so where, as here, the carriers have for many years relied upon the Commission's construction of the statute and established and published their rates in the same manner and form as the rates in the instant case. *U. S.* v. *Chicago North Shore R. Co.*, 288 U. S. 1, 13-14.

Nor does the report of the Commission give any cogent reasons for the extreme and abrupt departure from the settled administrative construction of the Act. But even if the report did give cogent reasons for such departure, it would be entirely improper to give that departure retroactive effect as the report and order herein effectually does. The situation would then be analogous to one where the Commission had established a regulation or practice within its jurisdiction and, having been in effect for some time, the regulation or practice had become a rule of action which entered into the business dealings of this country. In such a situation, while it might be necessary to change this regulation or practice from time to time as varying conditions require, logic dictates that it should never be changed except upon notice to the carriers and to the public affected thereby, and it "would be altogether intolerable if the change could be made retroactive." *Nebraska-Iowa Grain* v. *U. P. R. R. Co.*, 15 I.C.C. Rep. 90, 93-4.

The carriers have for many years so constructed their tariffs as to make their combination rates applicable from or to the ports of entry or exit on or adjacent to the international border which are the nearest points to the border [fol. 151] where the traffic can be interchanged between the United States and Canadian lines. It is hardly necessary to point out that the manner and form of tariff publication has been adopted in reliance of the Commission's many decisions, hereinbefore cited, which hold in effect that such publication complies with the provisions of the Act and results in making the carriers answerable only for those rates. In this report the Commission abruptly departs from that established principle and holds (Sheets 16-17) that such tariff publication and application do not comply with the provisions of the Act.

It is elementary that before the Commission is authorized to award reparation for alleged damages from past transaction it is necessary to find and fix what would have been a reasonable rate, regulation, or practice at the time

of the transactions which are the objects of the claim for reparation. *Sloss-Sheffield Steel & Iron Co.* v. *L. & N. R. R. Co.*, 51 I.C.C. 635, 639.

Thus, the question presented by the Commission's award of reparation is: When did the carriers' practice of publishing and maintaining rates to and from the ports of entry or exit cease to conform to or comply with the provisions of the Act as construed by the Commission? It had not, as recently as May 1, 1957, which is the date of the decision of the Commission in *Endicott-Johnson Corp.* v. *Akron, C. & Y. R.R. Co.*, 300 I.C.C. 373. In that case the entire Commission adhered to the principle that the publication of a rate to the international port of exit made the United States carriers answerable only for that rate. The Commission stated:

> "Rates assailed to points in Canada are combination rates, composed of factors applicable to Northgate and Portal, N. Dak., which are international boundary points, and to factors for transportation beyond, in Canada. Our consideration must be confined to the rate factors for the movements within the United States." (p. 384.)

[fol. 152] It had not done so less than seven months ago, when Division 3 decided *Conrad Fafard, Inc.* v. *Canadian National Rys.*, 302 I.C.C. 113. It was there held that the ports of entry of Detroit and Port Huron, Mich., "have been regarded by this Commission for all practical purposes, as the international boundary. *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 270 I.C.C. 710" (p. 163).

Even if the Commission herein correctly construes the provisions of the Act, defendants respectfully submit that construction is directly contrary to its own settled administrative interpretation, and should, therefore, not be given any retroactive effect. As stated in *Summer & Co.* v. *Erie R. Co.*, 262 I.C.C. 43, the "practical administration of the Interstate Commerce Act does not permit of any other course", and further:

> "* * * Decisions in major proceedings such as those cited determine the broad outlines of regulatory policy.

which of necessity must be followed in minor proceedings such as the one before us here. * * * The rates here in issue, like all other individual rates, are parts of an integral whole. A change in one rate frequently necessitates like changes in competitive rates in order to avoid the unjust discrimination and undue prejudice and preference which are forbidden by sections 2, 3, 216(d), 305(c), and 404(f) of the act. The regulatory process, therefore, must be continuing and consistent. *Youngstown Sheet & Tube Co.* v. *United States, supra; Board of Trade of Kansas City* v. *United States,* 314 U. S. 534; *Northern Pac. Ry. Co.* v. *United States,* 316 U. S. 346; *Virginia Stage Lines* v. *United States,* 48 Fed. Supp. 79. *An abrupt departure from precedent might require the reopening of previous decisions involving the same or similar issues and a reexamination of all that has gone on before.*" (p. 49.)

In *Eastern Livestock Cases of 1926,* 144 I.C.C. 731, 781; *Tri-State Packers' Assn., Inc.* v. *Pennsylvania R. Co.,* 209 [fol. 153] I.C.C. 192, 201; and *American Fruit Growers, Inc.* v. *Southern Pac. Co.,* 222 I.C.C. 513, 517; and cases there cited, in discussing the question of reparation with respect to the assailed rates, the Commission stated that when the history of the rates was such as to justify the carriers in believing that they were maintaining rates which had its approval, the Commission had the power to fix reasonable rates for the future and in that "flexible limit of judgment which belongs to the power of fixing rates" to refuse to hold the rates unreasonable in the past. By holding heretofore that rates published to United States ports of entry or exit on or adjacent to the international boundary fix the extent of the Commission's jurisdiction over international traffic "in so far as the transportation takes place within the United States", the Commission has given its tacit approval to the publication and maintenance of rates similar to those in issue in the instant proceedings. Having acted in reliance on that tacit approval for many years, the carriers should not now be held to have done so at their peril, and to have violated the law and made themselves liable for damages.

Not only are the rates on the outbound products themselves not in issue in these proceedings, but nowhere in the record is there any evidence to indicate that the measure of the assailed rates alone is responsible for the alleged inability of the complainants to compete in Official Territory in the sale of asbestos products. As a matter of fact, as has already been indicated, the products made from spinning fibre generally do not compete with those made from non-spinning fibre. Moreover, some of the complainants have plants in Official Territory as well as in the South.

Certainly on the record in these proceedings and without regard for the change in the Commission's jurisdictional concept hereinbefore discussed at length, reparation may not equitably be awarded.

[fol. 154] II.

THE REPORT OF THE COMMISSION IS IN ERROR AS TO MATTERS OF FACT.

The petitioners are firmly of the belief that the report of the Commission is in error as to matters of law for the reasons hereinbefore given, and if their contentions in that respect are upheld on reconsideration, it will be unnecessary to consider the remaining portion of this petition. Should the Commission refuse to accept the validity of the petitioners' contentions that the report of the Commission is in error as to matters of law, the petitioners respectfully submit that it is also in error as to matters of fact. They respectfully submit that on the record before the Commission it was error to find the assailed rates were and are unjust and unreasonable. It was also error to find the assailed rates are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors.

A. THE RATES WERE NOT AND ARE NOT UNJUST, UNREASONABLE, OR OTHERWISE UNLAWFUL.

The complaint in the titled case alleged in effect that the combination rates applicable on crude asbestos and asbestos

fibre from Black Lake, Coleraine, and Thetford Mines, P.Q., to Charlotte, N. C., were unjust, unreasonable, unduly and unjustly prejudicial compared with those applicable from the same origins to Chicago, Waukegan, Illinois, and Milwaukee, Wisconsin. That complaint has never been amended, and it should be decided with due regard for the allegations there made and the evidence submitted as proof of those allegations.

The remaining complaints, none of which was filed prior to December 6, 1954, alleged that the rates therein assailed were unlawful by comparison with rates in Official and Western territories. Those complaints must likewise be [fol. 155] decided with due regard to those allegations and the evidence offered in support thereof.

The record shows that with rare exception the defendants do not maintain joint class or commodity rates for application on traffic moving between points in Canada and points in Southern territory. That is an extremely important factor to be borne in mind in determining the lawfulness of the assailed rates since the pattern of rates applicable on this particular traffic to Southern destinations conforms to the pattern of rates applicable generally on traffic moving between points in Canada and points in the South.

The record also establishes the fact that rates on these commodities from the several origins to Chicago, Waukegan, Ill., and Milwaukee, Wisc., were established many years ago by Canadian lines to meet water competition, and the present threat of motor truck and/or water competition constitutes a practical deterrent in possible increases in the level of those rates.

The record shows that the preponderance of the shipments of asbestos to Carolina destinations are of spinning grades; that the reverse is true in Official and Western territories; that there are few, if any, shipments of spinning fibres from any of these origins to points west of Akron, O.; and that the products made from the one type of asbestos are not generally competitive with those made from the other. The record also shows that a revision of the joint rates on these commodities to destinations in Official territory was contemplated with a view to restrict-

ing the application of such rates to non-spinning grades of asbestos fibres. Admittedly, that revision has not been accomplished, as the report notes (sheet 15). That revision was agreed to by both the Canadian and the interested United States lines, but for reasons unknown to the United States lines, the Canadian lines, as the rate publishing lines, have refused to make the necessary tariff revision, [fol. 156] despite the repeated efforts of the United States lines to bring about the rate revision referred to.

The record is clear that the level of the joint rates to destinations in Official territory is a level depressed by effective motor truck competition. Admittedly, some of that rate structure was in existence before motor truck competition became a factor, but the record is clear that present-day motor truck competition is so real and effective that any attempt on the part of the petitioners to increase the level of those rates would divert the traffic to the motor carriers. The record is equally clear that motor carrier competition is not a factor affecting the movement of traffic and the rate level between the points here involved.

To enable the Commission to prescribe reasonable rates Congress delegated to it a quasi legislative or administrative power, the exercise of which necessarily involves the use of wide but sound discretion. The Supreme Court has aptly termed that discretion "the flexible limited judgment which belongs to the power to fix rates", but the Commission itself has repeatedly held that its flexible limit of judgment obtains equally whether the rate to be fixed is to apply as to the past, present, or future. The only effect of finding a rate unreasonable or unlawful for the past is to afford a basis for an award of reparation.

In *Anadarko Cotton Co.* v. *A., T. & S. F. Ry. Co.*, 20 I.C.C. 43, the Commission stated that the standard of the law by which the validity of any rate as affected by its amount is determined is not more definite than that it must be just and reasonable. It there noted that the test of reasonableness can be applied only by reference to and upon consideration of all pertinent facts, circumstances, and conditions affecting the rates in effect at any particular time. In that case the Commission also held that it was not "justified in awarding damages in any case except on a

basis as certain in law and in fact as is essential to the [fol. 157] support of a final judgment or decree requiring the payment of a definite sum of money by one party to another."

In considering the awarding of reparation, the Commission has steadfastly insisted upon its right to exercise that same flexible limit of judgment.

This Commission has an obligation in the public interest not to further drain the railroad's depleted treasury by giving windfalls to preferred shippers. The asbestos involved herein moved freely, and there is no evidence that the assailed rates hindered the sale or movement of a single shipment in the territory embraced by these complaints. To award reparation now on shipments which moved as long ago as 1949 would be completely unfair and inequitable, especially in view of the dire need for additional revenue as evidenced by the many recent *Ex Parte* proceedings Nos. 162, 166, 168, 175, 196, 206, and *Ex Parte* No. 212 now before this Commission seeking a further increase. The denial here would be nothing more than administrative justice.

The record in these proceedings proves conclusively that the assailed rates have not been shown to have been unjust and unreasonable for the past, and it can be said without any qualification or fear of contradiction that the record in these proceedings will not, as a matter of law, support an award of reparation.

Conclusion and Requested Findings

These complaints assail the lawfulness of rates applicable on international traffic moving from Canadian origins to Carolina destinations. The assailed rates reflect combination rates made over United States ports of entry on or adjacent to the international boundary, which also are the points nearest to the international boundary where Canadian and United States railroads may interchange international traffic.

[fol. 158] The importance of the legal principle here involved far transcends any other aspect of the proceedings.

The law is clear that United States lines have a clear alternative in respect to their participation in international

traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates, or they may become parties to *joint* rates covering the entire transportation, in which event they become jointly and severally liable for any unlawfulness in such rates. The law is equally clear that the Commission has jurisdiction over international traffic only in so far as it takes place within the United States.

For years prior to now the Commission has held that rates published to or from United States ports of entry or exit on or adjacent to the international boundary line fix the extent of the Commission's jurisdiction over international traffic, in so far as the transportation takes place within the United States, and the petitioners have relied on that holding by the Commission.

The petitioners respectfully submit that the prior holding of the Commission with respect to its jurisdiction reflects a practical and sensible construction of the language of the statute. They respectfully submit that the present holding of the Commission with respect to its jurisdiction reflects a wholly impractical and unrealistic construction of the statute, which consequently is unreasonable and, therefore, unlawful. To hold now that failure to publish rates to the actual international line, in lieu of rates to such ports of entry or exit on or adjacent to the international boundary where international traffic is interchanged between Canadian and United States carriers, constitutes a breach of their statutory duty and renders them liable for damages must be regarded as an unreasonable construction of the statute. Defendants respectfully submit that the Commission's abrupt departure from its [fol. 159] own settled administrative construction of the statute is arbitrary, in that it gives no cogent reasons for now overturning that construction and, in addition, gives retroactive effect thereto by awarding reparation.

WHEREFORE, petitioners respectfully request the Commission upon reconsideration to find that these complaints present issues not within the purview of the Act and are, therefore beyond the jurisdiction of the Commission. Should the Commission refuse to so find, petitioners re-

spectfully ask the Commission to find that the assailed rates have not been shown to have been or to be unjust, unreasonable, unduly preferential or unduly prejudicial. Petitioners respectfully ask that the complaints be dismissed:

Respectfully submitted,

J. Raymond Hoover,
J. Edgar McDonald,
John F. Reilly,
George J. Schwarz,
Attorneys for Defendants.

466 Lexington Avenue
New York 17, N. Y.

Certificate of Service.

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at New York, N. Y., this 13th day of June, 1958.

J. Edgar McDonald.

[fol. 160]

Appendix L to Complaint

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 10th day of December, A. D. 1958.

No. 30846

Thermoid Company, Southern Division

v.

Baltimore & Ohio Railroad Company, Et Al.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

[fol. 161] Upon consideration of (1) the record in the above-entitled proceedings, decided May 7, 1958, by the entire Commission; (2) petition of defendants for reopening, further oral argument, and reconsideration, dated June 13, 1958; and (3) complainants' reply thereto, dated July 24, 1958:

It is ordered, That the petition be, and it is hereby, denied in all respects, for the reasons that the findings and conclusions in the report of the Commission, decided May 7, 1958, are fully supported by the record, and the

petition does not present substantial grounds to warrant further oral argument and reconsideration.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 162]

APPENDIX M TO COMPLAINT

ORDER

INTERSTATE COMMERCE COMMISSION

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

[fol. 163] IN THE MATTER OF DEFENDANTS' PETITION TO SHORTEN THE NOTICE UPON WHICH ACTION REQUIRED BY ORDER MAY BE TAKEN.

PRESENT: KENNETH H. TUGGLE, Chairman, to whom the above-entitled matter has been assigned for action thereon.

The Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 25, 1953, and the entire Commission issued its report in the above-entitled proceedings including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958. Upon consideration of the records in these proceedings, and a petition of the defendant railroads for further modification of the order of May 7, 1958, to authorize the defendants to comply therewith upon not less than 10 days' notice, and for good cause shown:

It is ordered, That the petition be, and it is hereby, granted, and that the order entered in these proceedings on May 7, 1958, as modified, requiring the defendants to take certain action on or before March 26, 1959, upon not less than 30 days' notice, be, and it is hereby, further modified so as to authorize the action upon not less than 10 days' notice, without change in the effective date.

Dated at Washington, D.C., this 19th day of February, A. D., 1959.

By the Commission, Chairman Tuggle.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 164]

APPENDIX N TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30846*

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

PETITION FOR LEAVE TO FILE A PETITION ON BEHALF OF THE DEFENDANTS SEEKING REOPENING AND RECONSIDERATION

Come now the defendants in the above-entitled proceedings, sometimes hereinafter referred to as petitioners, and pray leave to file the attached petition seeking the reopening, reconsideration and vacation of the outstanding orders of the Commission therein.

In support of their prayer the petitioners respectfully show:

I.

The complaints in these proceedings allege that the rates applicable on carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts and asbestos waste [fol. 165] from specified origins in Quebec, Canada, to specified destinations in North and South Carolina were and are unjust, unreasonable, unduly preferential and prejudicial, as more specifically set forth therein, in violation of Sections 1 and 3 of the Interstate Commerce Act.

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* This proceeding also embraces *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31683; *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31684; *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31685 and *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31686.

In a report decided May 7, 1958, 303 I.C.C. 743, the Commission found the assailed rates to have been and to be unjust and unreasonable, and for the future unduly prejudicial. It also found that the complainants were entitled to an award of reparation and required the defendants to remove the undue preference and prejudice therein found to exist. It further found that the Commission was without jurisdiction to prescribe just and reasonable *joint* through international rates for the future.

II.

By petition dated June 13, 1958, these same petitioners sought the reopening and reconsideration of these proceedings on the ground that the report of the Commission is in error as to matters of law and of fact for the reasons set forth in detail in that petition. Their principal contention was that the assailed rates reflect combination rates made over United States ports of entry on or adjacent to the international boundary line, which for all practical purposes are border points and that consequently for the purpose of administering the Act, insofar as it applies to common carriers and to transportation subject to the provisions of the Act, the jurisdiction of the Commission attaches at the ports of entry into the United States "on or near the international boundary". Those ports of entry are also the points nearest the international boundary where traffic can be interchanged between the Canadian and United States lines.

That petition was denied by order of the Commission dated December 10, 1958.

[fol. 166] III.

In *Yellow Jacket Boat Company, Inc.* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, Docket No. 31990, the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, and destined to Denison, Texas. According to the report of the Commission by Division 3, 302 I.C.C. 657, decided January 21, 1958, the complaint in that proceeding assailed the carload rates "from the interna-

tional boundary to Denison" as being unjust and unreasonable. The rates charged on the shipments reflected a triple combination of rates made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, a point within Canada, across the international boundary to Detroit, Mich., a point within the United States, and a rate from Detroit, Mich., to Denison, Tex.

In the unanimous *Report of the Commission on Reconsideration* in that proceeding* (mimeographed), decided October 30, 1958, the Commission made the conventional statement (sheet 6) that "domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and reasonable joint through rates." It states (sheet 7) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It accordingly found that rates "from the *border points on or near the international boundary*"** were and for the future would be unjust and unreasonable to the extent that they exceeded or might exceed a class 50 [fol. 167] rate "from the *international boundary near Detroit to Denison*"**. The rate applicable from Detroit, Mich., to Denison, Texas, was a class 85 rate of $3.06 (sheet 2). The first class rate applicable from Detroit to Denison was $3.60, and the class 50 rate (50 percent of first class) prescribed was exactly 50 percent of the Detroit-Denison first class rate, namely $1.80.

IV.

The position of the Commission in the *Yellow Jacket* case, *supra*, is completely at variance and wholly irrecon-

* Commissioner Arpaia was necessarily absent and did not participate in the disposition of this proceeding.

** Emphasis supplied.

cilable with the position taken by the Commission in the instant proceedings.

In the *Yellow Jacket* case the second factor of the applicable combination rate carried the traffic across the international boundary from Windsor, Ont., a point wholly within Canada, to Detroit, Mich., a point wholly within the United States, the international boundary line between Windsor and Detroit being the center of the Detroit River. Nevertheless the Commission disregarded that rate, as well as the Mahone Bay-Windsor rate applicable wholly within Canada, holding that the complainant should properly assail only the rate applicable from Detroit to destination, the latter covering transportation wholly within the United States. The Commission obviously concluded that it had no jurisdiction over either of the other two factors, notwithstanding the fact that the second factor carried the traffic across the international boundary into the United States. That is exactly the position which the petitioners have maintained in these proceedings from the very inception thereof, only to have the Commission thus far fail or refuse to recognize the propriety thereof.

The conflict in the two opposite positions of the Commission is clearly apparent, and cannot be reconciled. If the position of the Commission in the *Yellow Jacket* case [fol. 168] is correct, as the petitioners believe it to be, the position of the Commission in the instant proceedings, where the complaints do not attack that portion of the assailed rates applicable from the international boundary and wholly within the United States, is obviously in error. In any event, it is completely at variance with its subsequent decision in the *Yellow Jacket* case, as well as with a long line of prior cases cited in the petition dated June 13, 1958, including *Carey Mfg. Co.* v. *G. T. W. Ry. Co.*, 36 I.C.C. 203, decided October 11, 1915; *M. Crelinsten & Sons* v. *Railway Exp. Agency*, 201 I.C.C. 284, and *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785. In the *Yellow Jacket* case, as well as in each of the other cases referred to, the Commission confined its consideration to the rate factor applicable wholly within the United States. As a matter of fact, in its decision in the *Yellow Jacket* case the Commission cited and properly relied upon the *Albee Fruit* case, *supra*, as authority for the proposition that it lacked juris-

diction to consider the Canadian factor even though that factor carried the traffic across the international boundary. The *Albee Fruit* case is one of the cases also cited and relied upon by the petitioners in support of their position. The action of the Commission in relying upon that case as authority for its position in the *Yellow Jacket* case is clear proof that the denial by the Commission of the petitioners' prior petition was obvious error.

From the very beginning of these proceedings your petitioners have adhered to and relied upon the theory underlying the decision of the Commission in the *Yellow Jacket* case. In the light of that decision they remain steadfast in their belief that the report of the Commission in these proceedings is so in error as to require their reopening for further consideration and disposition consistent with decisions of the Commission covering a period of over fifty years, both prior and subsequent to its decision in these proceedings.

[fol. 169] Petitioners respectfully submit that, unless and until resolved by the Commission, these conflicting decisions can only create considerable confusion and uncertainty, not only among representatives of the shipping public and the railroads, but also among members of the staff of the Commission, as to the proper construction of the statutory limitation on the jurisdiction of the Commission with respect to international traffic.

Wherefore, in accordance with the provisions of Rule 1.101 of the Commission's General Rules of Practice, petitioners respectfully request that they be permitted to file the attached petition seeking the reopening and reconsideration of these proceedings and the vacation of the outstanding orders of the Commission therein.

Respectfully submitted,

J. Raymond Hoover,
J. Edgar McDonald,
John F. Reilly,
George J. Schwarz,
Attorneys for Defendants.

466 Lexington Avenue
New York 17, N. Y.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at New York, N. Y., this 20th day of February, 1959.

J. EDGAR MCDONALD

[fol. 170]

APPENDIX O TO COMPLAINT

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31646*

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.

PETITION OF DEFENDANTS FOR REOPENING AND RECONSIDERATION

Come now the defendants in the above-entitled proceedings, sometimes hereinafter referred to as petitioners, and respectfully ask that they be reopened for reconsideration and for the vacation of the outstanding orders of the Commission therein.

In support of their prayer petitioners respectfully show:

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* This proceeding also embraces *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31683; *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31684; *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31685; and *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al.*, Docket No. 31686.

I.

Resumé of the Proceedings

These proceedings embrace five complaints, the first of which was considered in *Thermoid Company, Southern Division, v. Baltimore & O. R. Co.*, 288 I.C.C. 793, by [fol. 171] Division 3, decided May 25, 1953, but reopened for further hearing. The other four are additional complaints filed after the initial disposition of the first complaint.

The complaint filed on behalf of Thermoid Company, Southern Division v. Baltimore & Ohio Railroad Company et al. (Docket No. 30846), assails the *combination rates* and charges applicable on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., to Charlotte, N. C. It alleges, that those rates were and are unjust and unreasonable, in violation of Section 1 of the Act, and unduly and unjustly preferential of manufacturers located at Chicago, Milwaukee and Waukegan, and prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act. The prayer of the complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine and Thetford Mines, P. Q., Canada, to Charlotte, N. C., and to make reparation on 136 carload shipments forwarded during the period from June 23, 1949, to February 10, 1952, as well as during the pendency of the proceeding.

Following a hearing in that proceeding Examiner J. Edgar Snider submitted a proposed report which noted that the assailed rates were *combination rates* applicable to and from Newport, Vt., a port of entry to the United States on or adjacent to the Canadian border. That report stated:

> "Under Section 1 of the act, the Commission's jurisdiction applies to this transportation only to the extent that it took place in the United States. It is well settled that railroads within this country have a

clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are [fol. 172] answerable for those rates only, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179, and *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654.

"So far as the traffic in question is concerned defendants did not enter into joint through single factor rates from the Canadian origins to Charlotte and the combinations over Newport applied. The reasonableness of the factor from Newport to Charlotte is not in issue. It follows that since the rates from points in Canada to Charlotte are assailed complaint assails rates over which this Commission has no jurisdiction." (Sheets 1-2)

The proposed report accordingly concluded:

"The Commission should find that the rates to which there is complaint are not within the purview of the act and are therefore beyond its jurisdiction. The complaint should be dismissed." (Sheet 2)

The report of the Commission, by Division 3, 288 I.C.C. 793, stated in part as follows:

"Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in *joint international rates* and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15, 18. *So far as the instant traffic is concerned,*

[fol. 173] *the defendants have not entered into joint rates from the Canadian origins to Charlotte.*" (p. 794) (Emphasis supplied).

Nevertheless, the Commission concluded that

> "the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered." (p. 796)

By petition dated July 31, 1953, the defendants sought the reopening, oral argument, reconsideration of that proceeding, and their prayer was granted by order of the Commission dated April 5, 1954.

By petition dated May 17, 1954, the complainant sought "the further reopening of this proceeding for the purpose of rehearing and further hearing", and by order of the Commission dated July 30, 1954, the proceeding was reopened for further hearing.

By complaint filed on December 6, 1954, on behalf of Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division (Docket No. 31683) *combination rates* applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to North Charleston, S. C., are assailed. Those rates are alleged to be unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act, and unduly preferential or prejudicial, in violation of Section 3 thereof. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins specified to North Charleston, S. C., and [fol. 174] to make reparation on shipments forwarded during the statutory period preceding the filing of that complaint, as well as during the pendency thereof.

By complaint filed on December 6, 1954, on behalf of the Thermoid Company, Southern Division (Docket No. 31684) *combination rates* applicable on crude asbestos and asbestos fibre from Danville, St. Malachie, and Warwick, P. Q., to Charlotte, N. C., are assailed. Those rates are alleged to be excessive, unjust and unreasonable, and unjustly preferential and prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on crude asbestos and asbestos fibre from the Canadian origins named to Charlotte, N. C. No reparation is sought by that complaint.

By complaint filed on December 13, 1954, on behalf of the Union Asbestos and Rubber Company (Docket No. 31685) *combination rates* and charges applicable on crude asbestos and asbestos fibre from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Marshville, N. C., are assailed. Those rates allegedly were and are unjust, unreasonable, unduly preferential and prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of that complaint is that the defendants be required to establish just and reasonable rates for future application on carload shipments of crude asbestos and asbestos fibre from the Canadian origins named to Marshville, N. C., and to make reparation on shipments forwarded during the statutory period preceding the filing of the complaint, as well as during the pendency thereof.

By complaint filed December 13, 1954, on behalf of the Carolina Asbestos Company (Docket No. 31686) *combination rates* applicable on crude asbestos, asbestos fibre, as-
[fol. 175] bestos refuse, asbestos shorts, and asbestos waste, from Black Lake, Coleraine, East Broughton, Robertson, Thetford Mines, St. Joseph, Danville, St. Malachie, and Warwick, P. Q., to Davidson, N. C., are assailed. Those rates are alleged to be unjust and unreasonable and unduly preferential and prejudicial, in violation of Sections 1 and 3 of the Interstate Commerce Act. The prayer of that complaint is that the defendants be required to establish

just and reasonable rates for future application on carload shipments of crude asbestos, asbestos fibre, asbestos refuse, asbestos shorts, and asbestos waste, from the Canadian origins named to Davidson, N. C., and be required to make reparation on shipments forwarded during the statutory period preceding the filing of this complaint, as well as during the pendency thereof.

In the *Report of the Commission*, 303 I.C.C. 743, decided May 7, 1958, the Commission found that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, the specific rates set forth therein to the considered destinations.

The Commission further found that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, Pa., and destinations taking the same rates by the specific amounts set forth therein.

[fol. 176] The Commission further found that the rates on crude asbestos, asbestos fibre, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in Official Territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

The Commission further found that the complainants in Dockets Nos. 30846, 31683, 31685, and 31686 were dam-

aged and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases therein found to have been just and reasonable.

The report specifically provided for the addition of the applicable general increases authorized on and subsequent to March 12, 1951, to all of the rates resulting from the findings therein.

II.

The Report and Orders Are in Error as to Matters of Law

The legal principles involved in these proceedings are of such importance to both the Canadian and the United States lines affected thereby that they have already concluded to seek court review thereof if that becomes necessary. However, they are so completely convinced with the correctness of their position, they believe that upon further consideration the Commission will be persuaded that its report is in error. Accordingly they are submit- [fol. 177] ting this petition in order to afford the Commission an opportunity to correct its own error rather than to compel the carriers to seek relief through court review.

In their prior petition dated June 13, 1958, the defendants argued that the report is in error on the issue of jurisdiction. They there argued at length the history of the Act, principles of statutory construction, the previous construction by the Commission itself, the cases relied upon by the Commission, the Commission's prior concern over this issue, and the complete practicality of the construction contended for by the petitioners. They also argued that the report is in error as to the jurisdiction of the Commission over Canadian lines, that the report and order of the Commission amount to the prescription of through international rates, and that the report is in error in applying a changed concept of Commission jurisdiction retroactively.

In the light of the decision of the Commission in *Yellow Jacket Boat Company, Inc.* v. *Atchison, Topeka & Santa Fe Railway Company et al.*, Docket No. 31990, decided

October 30, 1958, they are more than ever convinced that those arguments are sound and properly applicable in this instance. However, in the interest of brevity and in order to minimize the necessity for repetition, your petitioners ask that the petition of June 13, 1958, be deemed a part hereof and that the specific arguments made in this petition be treated as additions to those previously submitted.

A. The Report Is In Direct Conflict With The *Yellow Jacket*; As Well As With Prior Decisions, Involving The Same Jurisdictional Principle.

In dealing with this petition, the fact to be kept constantly in mind is that since issuing its report in these proceedings on May 7, 1958, the Commission has reverted to its prior position with respect to the jurisdictional principle here involved.

[fol. 178] In *Yellow Jacket Boat Company, Inc.* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*, Docket No. 31990, the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, and destined to Denison, Texas. According to the report of the Commission, by Division 3, 302 I.C.C. 657, decided January 21, 1958, the complaint in that proceeding assailed the carload rates "from the international boundary to Denison" as being unjust and unreasonable. The rates charged on the shipments reflected a triple combination of rates, made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, a point within Canada, to Detroit, Mich., a point within the United States, and a rate from Detroit, Mich., to Denison, Tex.

In the unanimous *Report of the Commission on Reconsideration* in that proceeding* (mimeographed), decided October 30, 1958, the Commission made its conventional statement (sheet 6) that "domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and

* Commissioner Arpaia was necessarily absent and did not participate in its disposition.

reasonable *joint* through rates".* It states (sheet 7) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It accordingly found that rates "from the *border points on or near the international boundary*"* were and for the future would be unjust and unreasonable to the extent that they exceeded or might exceed a class 50 rate "from the *international boundary near Detroit to Denison*".* The rate applicable from Detroit, Mich., to Denison, Texas, was a class 85 rate of $3.06 (sheet 2). The first class rate [fol. 179] applicable from Detroit to Denison was $3.60, and the class 50 rate (50 percent of first class) prescribed was exactly 50 percent of the Detroit-Denison first class rate, namely $1.80.

In the *Yellow Jacket* case, the second factor of the applicable *combination rate* carried the traffic across the international boundary from Windsor, Ont., a point wholly within Canada, to Detroit, Mich., a point wholly within the United States, the international boundary line between Windsor and Detroit being the center of the Detroit River. Nevertheless the Commission disregarded that rate, as well as the Mahone Bay-Windsor rate applicable wholly within Canada, holding that the complainant should properly assail only the rate applicable from Detroit to destination, the latter covering transportation wholly within the United States. The Commission obviously concluded that it had no jurisdiction over either of the other two factors, notwithstanding the fact that the second factor carried the traffic across the international boundary into the United States. That is exactly the position which the petitioners have maintained in these proceedings from the very inception thereof, only to have the Commission thus far fail or refuse to recognize the propriety thereof.

The position of the Commission in the *Yellow Jacket* case, *supra*, is completely at variance with the position taken by the Commission in the instant proceeding, and

* Emphasis supplied.

the conflict in the two positions cannot be reconciled. If the position of the Commission in the *Yellow Jacket* case is correct, as the petitioners believe it to be, the position of the Commission in the instant proceedings, where the complaints do not attack that portion of the assailed rates applicable from the international boundary and wholly within the United States, is obviously in error. In any event, it is completely at variance with its subsequent decision in the *Yellow Jacket* case, as well as with a long line of prior cases cited in the petition dated June 13, 1958, [fol. 180] including *M. Crelinsten & Sons* v. *Railway Exp. Agency, Inc.*, 201 I.C.C. 284, and *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785. In the *Yellow Jacket* case, as well as in each of the other cases referred to, the Commission confined its consideration to the rate factor applicable wholly within the United States. As a matter of fact, in its decision in the *Yellow Jacket* case the Commission cited and properly relied upon the *Albee Fruit* case, *supra*, as authority for the proposition that it lacked jurisdiction to consider the Canadian factor even though that factor carried the traffic across the international boundary. The *Albee Fruit* case is one of the cases also cited and relied upon by the petitioners in support of their position. The action of the Commission in relying upon that case as authority for its position in the *Yellow Jacket* case is clear proof that the denial by the Commission of the petitioners' prior petition was obvious error.

(a) The United States Lines Do Not Participate in Joint Rates On The Involved Traffic.

The report of the Commission concedes (p. 732), as it must, that under the Interstate Commerce Act the jurisdiction of the Commission extends to the transportation here involved only to the extent that it takes place within the United States. It again concedes, as it must, that the rail carriers within the United States have a clear alternative with respect to their participation in international traffic, namely, they can publish rates to or from the international boundary, in which event they are answerable *only* for those rates, or they may participate in rates to or from

points in Canada and thus become *jointly and severally* liable for any unlawfulness in such rates.

The defendants have not entered into *joint rates* from the Canadian origins to the southern destinations here involved, and none of the complaints assails the lawfulness of the rates applicable to that portion of the transportation performed wholly within the United States. On the con- [fol. 181] trary, each of the five complaints which the Commission is here called upon to consider assails *combination rates*, made over United States ports of entry on or adjacent to the international boundary, applicable from Quebec origins to destinations in North and South Carolina. In each instance the first factor of the assailed combination rates is made up of *a single line rate* published by the Quebec Central Railway or the Canadian National Railways. Each of those lines alone controls the level of its rate and the United States lines have no voice whatever in the making of those rates or the level on which they are published and maintained. In each instance the second factor is a joint rate published by the United States lines alone. Those lines alone control the level of those rates and the Quebec Central and the Canadian National Railways have no voice whatever in the making of those rates or the level on which they are published and maintained.

The report states that the contentions of the defendants are based upon their assumption that since Newport and East Alburgh are ports of entry into the United States those points are, for all practical purposes, border points and that the rates therefrom to the considered destinations conform to the first alternative mentioned. The Commission, however, states that "the facts indicate otherwise", pointing out that Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and stating that the rates maintained by the Canadian lines to those points obligate those carriers "to provide substantial transportation service within the United States". What substantial transportation service the Canadian lines are obligated to perform within the United States in this instance, which they were not likewise obligated to perform in all of the other cases cited by the petitioners, is not apparent and the report of the Com-

mission makes no attempt to indicate. Actually, as the record proves conclusively, the only service performed by the Canadian lines is the delivery of the traffic to the [fol. 182] United States lines at those points, the points nearest the international boundary where traffic can be interchanged between Canadian and United States lines.

The report concedes that in some instances the Commission has considered ports of entry "such as Rouses Point, 0.5 mile from the boundary", as border points. That might be taken as an implication that whether or not a port of entry is to be treated, for all practical purposes, as a border point depends upon whether it is less than 3 miles from the international boundary line. Merely to ask if such an arbitrary yardstick may lawfully constitute the basis upon which the Commission may administer the statute in its application to international traffic is to disclose its complete lack of merit. Neither have the petitioners been able to find another case where the Commission exercised its jurisdiction because a *combination rate* applicable on international traffic made over a point 3 or 5 miles south of the international boundary.

In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, where the Commission was asked to deal with rates on fruit from Florida origins to Montreal, the Commission noted that the *combination rate* applicable from Rouses Point, N. Y., to Montreal, was published and on file with it, but nevertheless held that *the rate was not subject to the provisions of the Interstate Commerce Act.* How the Commission could regard the character of the rate factors applicable from the Quebec origins to East Alburgh or Newport in this instance any differently from the Rouses Point-Montreal factor in the *Fruit Importers* case is not readily apparent.

Crelinsten, M. & Sons v. *Railway Exp. Agency, Inc., supra*, involved the lawfulness of rates on strawberries from Florida origins to Quebec, the United States ports of exit being "Rouses Point, N. Y. or Highgate Springs, Vt., *points a few miles south of the international boundary*".* Actually the [fol. 183] distance from Highgate Springs, Vt., to the inter-

* Emphasis supplied.

national boundary was 3.53 miles. In that case the Commission was content to regard the transportation from Florida to Rouses Point, N. Y., or Highgate Springs, Vt., as that portion of the total transportation taking place within the United States, observing that "*practically* all of the transportation north of Rouses Point and Highgate Springs was in Canada".* Why it is not similarly bound in this instance, where "practically all of the transportation" north of Newport and East Alburgh was in Canada, is not made clear. What "substantial transportation service within the United States" were the Canadian lines which participated in the transportation of the instant traffic obligated to perform that the Canadian lines participating in the transportation of the traffic involved in the *Crelinsten* case were not likewise obligated to provide? The answer to that question obviously must be none whatever.

(b) Neither The News Syndicate Case Nor the Lewis-Simas-Jones Case Supports The Position Of The Commission.

In attempting to reconcile its decision in the *Yellow Jacket* case with the decision of the Supreme Court in *Great Northern Ry.* v. *Sullivan*, 294 U. S. 458, the Commission undertook to rely upon *News Syndicate Co.* v. *N.Y.C.R.R.*, 275 U. S. 179, and *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654, both of which these petitioners have heretofore cited and relied upon in support of their own contentions. Neither of those court decisions support the position taken by the Commission in these proceedings.

Admittedly, the Supreme Court sustained the authority of the Commission to consider the reasonableness of *joint* through international rates for the purpose of determining the amount of damages for which the carriers under its jurisdiction are *jointly and severally* liable.

[fol. 184] The Commission undertook to justify its decision in the *Yellow Jacket* case by arguing that in the *Great Northern* case the court only held that a finding that the *domestic* factor of the applicable through combination rate was unreasonable could not be sustained in the absence of a claim and a determination that the through rate was un-

* Emphasis supplied.

reasonable. It argued that in the exercise of its authority to award damages the Commission requires that "the total rate or charge within our jurisdiction" be shown to exceed a reasonable maximum. It took the position that in measuring damages on international traffic the distinction between *joint rates*, on the one hand, and local rates to and from the border, on the other, is crucial. It accordingly held that, where a complaint is not made against a *joint* through rate, the complaint should be directed to the local rate or rates from the international boundary. As the petitioners have repeatedly pointed out, and have once more emphasized herein, the United States railroads have not joined in *joint* through rates for application on the traffic here involved. On the contrary, it moves under *combination rates* applying to and from United States ports of entry on or adjacent to the international boundary. Those points are not only ports of entry for customs purposes, but also the points nearest to the exact international boundary where traffic may be interchanged between the Canadian and United States carriers. Accordingly the jurisdiction of the Commission in these proceedings is limited, as it was in the *Yellow Jacket* case, to a consideration of the "rates from the border points on or near the international boundary".

(c) The Decision Results In Confusion As To The Proper Interpretation Of The Statutory Limitation Of The Commission's Jurisdiction Over International Traffic.

Throughout the course of these proceedings the petitioners have recognized and conceded that under the provisions of Section 1 of the Interstate Commerce Act the Commission has jurisdiction over common carriers engaged in the [fol. 185] transportation of property from or to any place in the United States to or from a foreign country, as well as over the transportation of such passengers and property in so far as transportation takes place within the United States. The principal issue presented by this litigation, the petitioners continue to insist, is what constitutes transportation "within the United States" within the meaning of the statute.

It is well established by prior decisions of the Commission and the courts, as well as by statements of the Com-

mission in the instant report, that the *United States* railroads may publish reasonable and lawful rates to and from the border, in which event they are answerable *only* for those rates, or they may participate in *joint* international rates and thus become *jointly and severally* liable for any unlawfulness found in such rates.

The Commission concedes (sheet 5), as it must, that the defendants do not maintain *joint* through rates on the involved commodities from Quebec origins to southern destinations, which automatically means that the assailed rates do not fall within the second alternative, and afford no basis for the assumption of jurisdiction by the Commission on that particular ground. The Commission concedes, again as it must, that the assailed rates reflect *combination* rates made over United States ports of entry where the traffic is interchanged between the Canadian and the United States railroads. Nevertheless, the Commission states (sheet 6) that rates so published do not conform to the first alternative mentioned, apparently because Newport and East Alburgh are 5 and 3 miles, respectively, south of the international boundary and the rates maintained by the *Canadian* lines to those points "obligate those carriers to provide substantial transportation within the United States". Inasmuch as the United States railroads have only two alternatives in dealing with the publication and maintenance of rates to apply on international traffic, according to the decisions of the Commission and the courts, [fol. 186] and they have not conferred jurisdiction on the Commission in this instance by exercising the alternative of participating in *joint* rates, the Commission is obviously wrong in holding that the combination rates here assailed, which apply to and from the United States ports of entry, do not conform to the other alternative.

Whether or not the Commission has jurisdiction to deal with the issues sought to be raised by these proceedings, in spite of the fact that the United States railroads do not participate in *joint* international rates, necessarily depends solely on whether or not the fact that the Quebec Central and the Canadian National Railways maintain single line rates to Newport and East Alburgh, respectively, and transport this traffic across the international

boundary to those ports of entry solely for the purpose of interchanging it with the United States railroads constitutes "substantial transportation within the United States". Certainly the report does not undertake to show that the transportation performed by the Canadian lines to those ports of entry and there interchanging this particular traffic with *United States* railroads is any greater than, or for that matter even as great as, that performed by the Canadian lines in interchanging the traffic involved in the *Carey*, *Crelinsten*, *Albee Fruit*, and *Yellow Jacket* cases with the United States lines at those various ports of entry.

As long ago as 1915, the Commission took the position that its jurisdiction "attaches at the ports of entry". *Carey Mfg. Co.* v. *G. T. W. Ry. Co.*, 36 I.C.C. 203. In that proceeding, which involved *joint* international rates, the Commission held it could not prescribe *joint* through rates from points in Canada to destinations in the United States, but that it could control the rates which the American lines charge from the ports of entry in the United States to destinations in the United States whether they are *joint* rates or separately established rates applicable to the [fol. 187] through transportation. In that proceeding the Commission stated that if the defendants did not readjust their rates in conformity with the finding made therein before December 1, 1915, an order would be entered "requiring the defendants subject to our jurisdiction to establish, in lieu of the present rates, joint and local rates *from the ports of entry*".* Petitioners can find no decision of the Commission involving traffic moving under *combination rates* made over United States ports of entry on or adjacent to the international boundary except the instant one, where the Commission did not take the position that it had jurisdiction to consider only the factor applicable to that portion of the transportation wholly within the United States, namely, the factor maintained by the United States lines from or to ports of entry or exit. In each of those cases the Canadian factor applicable to or from the port of entry or exit necessarily included transportation performed by the Canadian lines within the United States to or from the

* Emphasis supplied.

port of entry at which it was interchanged with those lines. And, after completely ignoring or wilfully departing from that well established principle in the instant proceedings, the Commission in the *Yellow Jacket* case reiterates and again applies that very principle, stating that where shipments originating in Canada move on local rates "from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary".

Petitioners respectfully submit that such inconsistency on the part of the Commission can only create confusion among representatives of the shipping public and rail carriers alike, as well as among representatives of the staff of the Commission itself, as to the proper interpretation and application of the statutory limitation on the jurisdiction of the Commission with respect to international traffic. [fol. 188] In the *Yellow Jacket* case, the complaint apparently alleged (302 I.C.C. 657) that the rates from the international boundary were and are unjust and unreasonable, and asked the Commission to prescribe just and reasonable rates for the future and also to award reparation on past shipments. So far as appears, there was no rate applicable "from the international boundary" to Denison, Texas, the destination there involved. There was a factor applicable from Windsor, Ont., across the international boundary to Detroit, Mich., a port of entry into the United States, and a rate from that point to Denison. What the Commission did, as has heretofore been shown, was to treat not the total rate or charge applicable from the exact international boundary line to Denison, Texas, but only the third factor of the applicable combination rate which applied from Detroit, the port of entry, to Denison, Texas. To have dealt with the total transportation taking place within the United States would have required dealing with a part of the second factor, the Windsor-Detroit international rate, together with the Detroit-Denison factor. Although the instant proceedings and the *Yellow Jacket* case involve almost identical situations, the reports of the Commission nevertheless deal with the jurisdictional aspect of each in an entirely different and irreconcilable manner.

In the *Yellow Jacket* case, the publication of a rate from Detroit, the port of entry, to cover transportation wholly within the United States, had the effect of limiting the jurisdiction of the Commission, or at least the practical exercise of that jurisdiction, to the factor applicable wholly within the United States. In the instant cases, similar rate publication has failed to similarly protect the defendants, and particularly the United States railroads, from the exercise of the Commission's jurisdiction, in direct contravention of its own statement with respect to the point at which its jurisdiction attaches.

If the premise of the *Yellow Jacket* case is correct, as the defendants believe it to be, it follows that in every com- [fol. 189] plaint seeking relief for the future in connection with rates applicable on international traffic, there must be an allegation that the *joint* or *combination* rates assailed are unlawful to the extent they apply to the transportation which takes place within the United States. Nor should the situation be substantially different where the issue relates to past shipments on which the complainant seeks an award of reparation. Admittedly, if the United States lines participate in *joint* rates on international traffic, the Commission has jurisdiction to consider the lawfulness of such rates, but *only* for the ascertainment of damages sustained by a complainant in consequence of the carriers' breach of their statutory duty to maintain lawful rates to and from the border. Under the doctrine of the *Yellow Jacket* case a complainant seeking reparation would likewise have to allege that the rates assailed were unlawful to the extent that they applied to transportation wholly within the United States.

Such allegations would require a complainant to sustain its burden of proof by evidence directed solely to the level of rates and to the transportation thereunder wholly within the United States. Otherwise the Commission would be considering and dealing with rates, transportation factors, and standards over which it has no jurisdiction whatever and of which it may not take official notice. A complaint not so limited but which assailed through rates alone and rested on evidence directed solely to the through rates and through transportation, as in the instant proceedings, should be dismissed on the ground that the rates complained

of are not within the purview of the Act and are, therefore, beyond the jurisdiction of the Commission, as Examiner J. Edgar Snider concluded in his proposed report in the initial hearing in the title proceeding.

Such a doctrine would perpetuate the principle first announced in the *Carey* case, adhered to by the Commission for more than 40 years, and only recently reiterated and [fol. 190] reaffirmed in the *Yellow Jacket* case. It would automatically compel the dismissal of the instant complaints if the petitioners are correct in their contention that, as ports of entry on or adjacent to the international boundary, East Alburgh and Newport are, for all practical purposes, border points within the meaning of the statute, just as were all the other ports of entry in the long line of cases referred to. The application of that doctrine would mean that there could be no question as to the jurisdiction of the Commission over such rates and that the lawfulness of rates applicable wholly within the United States would be measured solely by recognized Commission standards.

Under the doctrine of the *Carey-Albee Fruit-Crelinsten-Yellow Jacket* cases, the jurisdiction of the Commission attaches at United States ports of entry or exit, and complainants assailing rates applicable on international traffic must allege and prove the unlawfulness of the factors applicable to or from those ports of entry for transportation wholly within the United States. In such instances the defendants know that the issues they are called upon to meet relate solely to the lawfulness of the rate factors applicable wholly within the United States to or from those ports of entry and exit.

Under the doctrine of the instant proceedings, where the Commission assumes jurisdiction beyond the ports of entry or exit, complainants assailing international combination rates made over ports of entry or exit must allege and prove the through rates unlawful. And, the United States railroads must defend the lawfulness of the through combination rates, despite the fact that the *United States* railroads have elected not to participate in *joint* rates on such traffic, and despite the further fact that the first factor of the assailed combination rate is published and controlled entirely by the *Canadian* railroads.

Furthermore, relying on the doctrine of the *Carey-Albee Fruit-Crelinsten-Yellow Jacket* cases, *United States* rail- [fol. 191] roads for years have published rates for application to and from United States ports of entry or exit, where they chose not to be parties to *joint* rates on international traffic, in the belief that they were conforming to their alternative under the law. The conflict between the doctrine of the *Carey-Albee Fruit-Crelinsten-Yellow Jacket* cases and the instant proceedings leaves those carriers uncertain as to whether they are conforming to the law, as laid down by the Commission and the courts, or may still be held to have breached their statutory duty.

Moreover, not only the carriers but the shipping public, as prospective complainants, is entitled to a clear administrative finding by the Commission which would leave no room for doubt as to the extent of its jurisdiction and when it will be applied or exercised and when it will not. Such a clear administrative finding is also desirable in order that the staff of the Commission may have no doubts as to the legal requirements of rate publication, and the procedural requirements of pleading and proof where international traffic is involved.

Rule 1.28 of the Commission's General Rules of Practice requires that formal complaints "be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the provisions of the Act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation". While the Commission has always been extremely liberal in construing the pleadings before it, the Interstate Commerce Act requires that the carriers be notified of the complaint they are required to defend and there must be a statement of the thing which is claimed to be wrong sufficiently to put the carriers upon their defense. *U. S. v. Southern Ry. Co.*, 21 I.C.C. 393. The Commission has also held that, while technicalities will not be permitted to defeat the ends of justice, the Commission must be guided by considerations of equity, and cannot sanction the [fol. 192] unwarranted broadening of issues or the fashioning of a case along lines not so explicitly stated at the outset as to enable defendants to come before it with reasonable

certainty of the things to be defended. *Stuarts Draft Milling Co.* v. *S. Ry. Co.*, 31 I.C.C. 623.

That is particularly true where reparation is sought. When the question of damages is raised carriers have a right to be informed with reasonable definiteness of the grounds on which the claim is based. *Weinberg & Gilbert* v. *Atlantic Coast Line R. Co.*, 208 I.C.C. 749, 752. As the Commission said in *South Carolina Produce Assn.* v. *Aberdeen & R. R. Co.*, 205 I.C.C. 581, 586, although it seeks to avoid technicalities in its procedure, it cannot waive those rules of evidence which afford protection to the rights of the parties to fully inquire into matters of fact urged against them, and that is especially true when the Commission is acting in a quasi-judicial capacity in awarding money damages. The Commission has also held that it is not justified in awarding damages in any case except on a basis as certain and definite in law and in fact as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another. *Anadarko Cotton Co.* v. *A.T. & S.F. Ry. Co.*, 20 I.C.C. 43, 49.

In these proceedings the Commission for the first time takes the position that United States ports of entry adjacent to but not on the exact international boundary are not "for all practical purposes * * * international-border points", and thereby creates needless confusion as to the extent of the jurisdiction of the Commission with respect to international traffic and when that jurisdiction will or will not be exercised.

In *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365, a proceeding involving northbound international traffic subject to combination rates made over Port Huron, Mich., the Commission referred to Port Huron as "the last station in the United States on the route of movement", and held [fol. 193] that it might determine only the lawfulness of the factor applicable to the transportation within the United States, citing *Hoffman-Taff, Inc.* v. *St. Louis-S.F. Ry. Co.*, 279 I.C.C. 710. In the latter case, which involved southbound international traffic subject to combination rates made over Detroit and Port Huron, the Commission characterized those ports of entry as "for all practical purposes * * *

international-border points", and declined to consider the complaint on the ground that it assailed rates over which the Commission had no jurisdiction, despite the fact that it involved factors applicable from Canadian origins to Detroit and Port Huron, Mich., which certainly obligated the Canadian carriers to provide "transportation service within the United States" in order to interchange that particular traffic with their American connections at those ports of entry.

Like Detroit and Port Huron, East Alburgh, Vt., on the Canadian National Railways, and Newport, Vt., on the Quebec Central Railway, are "the last station in the United States on the route of movement" on northbound traffic through those ports of exit, and the first "station in the United States on the route of movement" on southbound traffic.

The refusal of the Commission in these proceedings to treat Newport and East Alburgh as international border points "for all practical purposes", as it did Detroit and Port Huron in the *Hoffman-Taff* and *Dow Chemical* cases, creates needless confusion. Adherence to the position taken by the Commission in the *Carey-Crelinsten-Albee Fruit-Yellow Jacket* cases would result, not only in a practical construction of the statute and a practical exercise of the jurisdiction of the Commission thereunder, but also in a uniform construction of the statute and a uniform exercise of the jurisdiction of the Commission thereunder. The desirability of interpreting the statute in that practical manner, and in exercising the jurisdiction of the Commission [fol. 194] accordingly, rather than in the technical, impractical, and wholly unrealistic manner followed in these proceedings, is too obvious to require argument.

B. The Findings And Order Are Arbitrary And Baseless.

The Interstate Commerce Act applies to international commerce *only* to the extent that the transportation takes place within the United States. *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654. Whatever power Congress may have to regulate the conduct of the United States railroads doing business abroad by the limiting provisions of the Transportation Act of 1920, it expressed its purpose not to empower the Commission with general authority to regu-

late rail transportation in foreign countries. Having expressed that purpose, it certainly cannot be argued that Congress had by implication granted the Commission any power to regulate the conduct of foreign carriers and rail transportation in foreign countries. *U. S. v. Pennsylvania R. Co.*, 323 U. S. 612, 621. The failure of the Commission in these proceedings to realize an actual and not just a theoretical limitation on the extent of its jurisdiction makes the report and order invalid as a matter of law.

The report of the Commission purports to recognize the fact that under the law the United States rail carriers have a clear alternative with respect to their participation in international traffic. They may either participate in *joint* international rates to or from points in Canada, and thus become *jointly and severally* liable for any unlawfulness in such rates, or they may publish rates to and from the international boundary, in which event they are answerable *only* for the rates applicable wholly within the United States.

The rates involved in these proceedings are not *joint* rates but *combination rates* made over United States ports of entry, the first stations within the United States on the [fol. 195] routes of movement, and also the first points where traffic is or can be interchanged between Canadian and United States railroads. Under the doctrine of the many Commission cases cited, and particularly *Hoffman-Taff, Inc.* v. *St. Louis-S.F. Ry. Co.*, 279 I.C.C. 710, those ports of entry "for all practical purposes are international-border points". Despite the fact that the United States railroads do not participate in *joint* international rates for application on this particular traffic, the report and order of the Commission nevertheless undertake to dispose of the issues raised by the complaints as if for all practical purposes the United States railroads were and are parties to *joint* international rates. In that respect the report and order of the Commission are in error as a matter of law.

Each of the complaints in these proceedings alleges, not that the applicable rates were, are, and for the future will be unlawful "insofar as the transportation took or takes place within the United States", but rather that the rates applicable from origins in Quebec to destinations in North and South Carolina were, are, and for the future will be unlawful. Furthermore, the evidence offered by the

complainants has been submitted squarely in support of those allegations. The prayer of each complaint asks the Commission to prescribe lawful rates not for that portion of the transportation which takes place within the United States, but for application on the involved traffic from Quebec origins to Charlotte and the other southern destinations. At no time during the course of these proceedings did the complainants contend or offer any evidence to prove that the rates assailed in the several complaints were, are, or will be unlawful "insofar as the transportation took or takes place within the United States". On the contrary, in keeping with the allegations contained in the complaints, the complainants have steadfastly maintained that the assailed international rates were and are unlawful, and not [fol. 196] just the measure or portion thereof which covers the transportation service performed within the United States. Accordingly, the complaints present issues not within the purview of the Act and, therefore, beyond the Commission's jurisdiction.

In an apparent attempt either to disregard or circumvent that fatal jurisdictional defect, the Commission proceeds to consider the complaints as though they in fact assail only the measure of the through rates which applies to that portion of the transportation which took or takes place within the United States. On that wholly unwarranted departure from the pleadings before it, the Commission then proceeds to consider evidence offered in support of the actual allegations of the complaints filed with the Commission, and on that evidence alone makes the findings which are here challenged. Stated another way, without any complaint assailing as unlawful *only* the measure of the rates applicable wholly within the United States, and without any evidence which would prove the validity of such an allegation if actually made, the Commission nevertheless makes findings which could be justified only in proceedings in which those issues are properly raised and in which competent evidence is introduced justifying and supporting findings based thereon.

As has heretofore been pointed out, the Commission's own rules of practice require that formal complaints "be so drawn as fully and completely to advise the parties defendant and the Commission in what respects the pro-

visions of the Act have been or are violated or will be violated, and should set forth briefly and in plain language the facts claimed to constitute such violation". The Act requires that the carriers be clearly informed of the complaint they are called upon to defend, and while the Commission has always been extremely liberal in construing the pleadings before it, and has declined to permit technicalities to defeat the ends of justice, the Commission has held that it must be guided by considerations of equity, and it cannot [fol. 197] sanction the unwarranted broadening of issues or the fashioning of the case along lines not so explicitly stated at the outset as to enable the defendants to come before it with reasonable certainty of the things to be defended. Neither can it waive those rules of evidence which afford protection to the rights of the parties fully to inquire into matters of fact urged against them, and that is especially true where, as here, the Commission is acting in a quasi-judicial as well as in a legislative capacity.

On the record in these proceedings the findings and the resulting order are arbitrary and baseless, and the use of the limiting clause "insofar as the transportation took or takes place within the United States" has no validating effect thereon.

(a) The Findings That The Assailed Rates Were, Are, And Will Be Unlawful.

Admittedly, if the United States railroads participate in *joint* rates on international traffic, the Commission has jurisdiction to consider the lawfulness of such rates, but *only* for the ascertainment of damages sustained by complainants in consequence of the carriers' breach of their statutory duty to maintain lawful rates to and from the border. Although the United States railroads elected not to participate in *joint* rates on this international traffic, it is obvious that the Commission has treated the complaints and the evidence as if the assailed rates were in fact *joint* rates.

By reason of the fact that the Commission has refused to recognize Newport and East Alburgh, the ports of entry here involved, as international border points for all practical purposes, but instead has taken the position that the

rates maintained by the *Canadian* lines to those points obligate those carriers to provide substantial transportation service within the United States, neither the Commis-[fol. 198] sion, the *Canadian* railroad defendants, the *United States* railroad defendants, nor a court of review may determine from the record in these proceedings the measure of the assailed rates, or those to be established and hereafter maintained, "insofar as the transportation took or takes place within the United States". Neither does the record contain any indication of the measure of the compared rates to Ambler, Pa., and destinations taking the same rates, in so far as that transportation "took or takes place within the United States". Since none of the complaints nor the evidence submitted in support thereof is directed to the measure of the rates and charges made for the transportation which "took or takes place within the United States", and since there is no evidence showing the relative measure of the rates assailed as unlawful versus that of the allegedly preferential rates "insofar as the transportation took or takes place within the United States", it follows that the findings of the Commission that the assailed rates were and are unjust and unreasonable, and are and will be unduly prejudicial and unduly preferential, are invalid. Otherwise the Commission would be dealing with a complaint assailing rates over which it had no jurisdiction and considering evidence with respect to rates and transportation, a substantial portion of which covers railroad service within Canada for which none of the defendants are answerable to the Commission.

The report and order of the Commission are invalid because the allegations of the complaint and the evidence submitted to substantiate those allegations are matters not within the purview of the Commission, and therefore beyond its jurisdiction. They are also invalid because the Commission in effect undertook to remedy the jurisdictional defect in the complaints by considering them as assailing the rates applicable on asbestos from Quebec origins to destinations in North and South Carolina only "insofar as the transportation took or takes place within the United States, and then evaluating evidence submitted in support of entirely [fol. 199] different allegations in an effort to relate it, not

to the allegations of the complaint as filed with the Commission, but rather as the Commission would construe the allegations of the complaint and the evidence after the record had been closed. The Commission thereupon undertook to make findings related to the format of the hybrid complaint created by it, basing those findings upon evidence submitted in support of entirely different allegations and issues. Such administrative legerdemain results in findings without a single shred of evidence to support them. Since findings not supported by competent evidence are invalid, these findings must be deemed to be arbitrary and baseless.

The Interstate Commerce Act gives the right to a full hearing, and that right imposes upon the Commission the duty of deciding proceedings in accordance with the facts proved. A finding without evidence is arbitrary and baseless. *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88. If that were not so, as the court there pointed out, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

(b) The Order Does Not Afford An Actual Alternative.

In *Texas & Pac. Ry. Co.* v. *U. S.*, 289 U. S. 627, the Supreme Court held (p. 650) that where an order is made under Section 3 an alternative must be afforded, and that the situation must be such that the carrier or carriers, if given an option, have an *actual* alternative. The court noted, however, that was not true of an order issued pur-
[fol. 200] suant to Section 15(1) of the Interstate Commerce Act prescribing maximum or minimum, or maximum and minimum rates.

The report of the Commission in these proceedings merely finds the assailed rates "are and will be unduly prejudicial to the complainants and unduly preferential

to the complainants' competitors in Official Territory". It does not and could not make any finding that the assailed rates "for the future will be" unjust and unreasonable. That is so, not only because of the jurisdictional limitation on the Commission's power to prescribe rates, but also because the lawfulness of the rates to Official Territory is not in issue in these proceedings. It follows that the Commission's order dated May 7, 1958, is one issued under Section 3 and not one issued pursuant to the provisions of Section 15(1).

In complying with a Section 3 order the defendants, under the principle laid down by the Supreme Court in the *Texas & Pacific* case, have an actual alternative of either increasing the allegedly preferred basis of rates or lowering the allegedly prejudiced basis. To be valid, the order in this instance must give the defendants the actual option of either increasing the prejudicial rates to Ambler, and the destinations taking the Ambler basis of rates, or lowering the preferential rates to the southern destinations involved, to reflect the differences fixed by the Commission as necessary to remove the prejudice and preference found to exist.

The report of the Commission states (p. 755) that the rates from the Quebec Central origins to destinations in Official Territory "appear to represent reasonable maxima". Inasmuch as the order of the Commission dated May 7, 1958, refers to that report and makes it a part of the order, the defendants actually do not have the option of increasing the allegedly preferential rates, since the existing rates to those destinations "represent reasonable maxima". [fol. 201] Therefore, the practical effect of the order of the Commission is to prescribe rates, contrary to the principle laid down by the Supreme Court in the *Texas & Pacific* case, despite the fact that the order is not one issued under Section 15(1), and despite the further fact that the Commission is here without authority to prescribe a just and reasonable basis of rates for the future. Viewed in that light, the order of the Commission is invalid because the Commission in effect is prescribing rates, something it can only do where orders are issued under the provisions of Section 15(1). That is made clear by the decisions of the Supreme Court in *New York* v. *U. S.*, 331 U. S. 284, and

Ayrshire Corp. v. United States, 335 U. S. 573. As both of those decisions indicate, in the Commission proceedings there under review the Commission had made findings that the rates were, and for the future would be, unjust, unreasonable, unduly and unreasonably preferential and prejudicial, and had prescribed a just and reasonable basis of rates for the future under Section 15(1). The court clearly indicated that an order fixing rates is invalid unless it is one issued under Section 15(1) and is supported by findings that the prescribed rates will be just and reasonable.

(c) The Finding That The Assailed Rates Were And Are Unjust And Unreasonable Is Invalid.

If it be said that the report and order does give the defendants an actual alternative, the finding (p. 755) that the assailed rates were and are unjust and unreasonable "insofar as the transportation took or takes place within the United States" automatically becomes invalid.

That finding obviously stems from the action of the Commission in treating the assailed *combination* rates as *joint* rates in order that the Commission might assert jurisdiction to consider the lawfulness of those rates. Even under that circumstance the jurisdiction of the Commission [fol. 202] is limited and attaches only for the ascertainment of damages sustained by the complainants in consequence of the defendants' alleged breach of their statutory duty to maintain lawful rates to and from the border.

The finding that the assailed rates were and are unjust and unreasonable rests on a comparison of those rates with the compared Quebec Central rates to Ambler, and the destinations taking the same rates, which the Commission stated (p. 755) "represent reasonable maxima". If it be said that the Section 3 order in fact gives the defendants the alternative of either raising the Ambler rates or lowering the rates to Charlotte, and the other southern destinations, the mere fact that the Ambler rates may lawfully be increased means that the existing Ambler rates are less than maximum reasonable rates. That fact automatically destroys any basis for regarding the compared Ambler rates as maximum reasonable rates. It also means that the lower Ambler rates are not a proper comparative

basis which would justify an award of reparation on shipments to Charlotte and the other southern destinations.

If it is the position of the Commission that the order is a lawful Section 3 order, which in fact affords the defendants an actual alternative, its action in awarding reparation based on a comparison with Ambler rates, which may be increased because they are less than maximum reasonable rates, is arbitrary and baseless.

Conclusion and Requested Findings

These complaints assail the lawfulness of rates applicable on international traffic moving from Canadian origins to destinations in North and South Carolina. The assailed rates are not *joint* rates but *combination* rates made over United States ports of entry on or adjacent to the international boundary. Those ports of entry are also the first stations on the Quebec Central Railway and the Canadian [fol. 203] National Railways south of the international boundary, and the points nearest to the boundary where the Canadian and United States railroads may interchange international traffic.

For years prior to its report in these proceedings the Commission uniformly held that rates published to or from United States ports of entry or exit on or adjacent to the international boundary line fixed the extent of the Commission's jurisdiction over international traffic, or at least the extent to which that jurisdiction would be exercised. Since 1915, the petitioners have relied on that well established principle in publishing and maintaining rates for application on international traffic.

In these proceedings the Commission refuses to adhere to that principle for the first time. The Commission not only treats the assailed international rates as *joint* rates, which would give it jurisdiction only to ascertain the damage sustained by the complainants as a result of the defendants' alleged breach of their statutory duty to publish and maintain reasonable rates to and from the exact boundary, and to issue a cease and desist order, but undertakes to make findings the effect of which can only be to fix the rates to be charged from origins in Quebec to destinations

in North and South Carolina. It even goes so far as to apply retroactively the changed concept of Commission jurisdiction created in this report.

Having departed from that principle of more than forty years standing, the Commission in its *report on reconsideration* in the *Yellow Jacket* case, decided less than six months after the issuance of the report in these proceedings, reverts to the principle that its jurisdiction attaches at ports of entry or exit, or will be exercised only at those points.

The petitioners respectfully submit that the prior holdings of the Commission with respect to its jurisdiction [fol. 204] and the exercise thereof, reiterated and reaffirmed in the *Yellow Jacket* case, reflects the only practical construction and application of the language of the statute. The petitioners respectfully submit that the holding of the Commission in these proceedings with respect to its jurisdiction or the application thereof reflects a wholly impractical, unrealistic, and arbitrary construction of the statute.

Moreover, wholly apart from the abrupt departure of the Commission from its own administrative holding that its jurisdiction attaches at ports of entry and exit, the findings and order of the Commission are arbitrary and baseless for the reasons hereinbefore set forth.

WHEREFORE, the petitioners respectfully request the Commission to reopen these proceedings, and upon further consideration to find that these complaints present issues not within the purview of the Interstate Commerce Act and are, therefore, beyond the jurisdiction of the Commission. They also respectfully ask that the prior findings be reversed, the order vacated and set aside, and the complaints dismissed for the reasons hereinbefore given.

Respectfully submitted,

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466 Lexington Avenue
New York 17, N. Y.

[fol. 205] CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in these proceedings by mailing by first-class mail a copy thereof properly addressed to each of such parties.

Dated at New York, N. Y., this 20th day of February, 1959.

J. EDGAR MCDONALD.

[fol. 206]

INTERSTATE COMMERCE COMMISSION

No. 30846[1]

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

Decided

Rates on crude asbestos and asbestos fiber from Danville, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Que., Can., to Charlotte, Davidson, and Marshville, N. C., and North Charleston, S. C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and unduly prejudicial, and for the future to be unduly prejudicial. Commission found, without jurisdiction to prescribe just and reasonable joint through rates for the future. Reparation awarded, undue prejudice ordered removed, and prior order in No. 30846, 288 I.C.C. 793, vacated and set aside.

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[1] This report also embraces No. 31683, Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division v. Baltimore & Ohio Railroad Company et al.; No. 31684, Thermoid Company, Southern Division v. Same; No. 31685, Union Asbestos and Rubber Company v. Same; and No. 31686, Carolina Asbestos Company v. Same.

Appearances as in prior report in No. 30846, 288 I.C.C. 793, and:

E. B. Ussery, Harrell L. Golden, and *H. V. Fleming* for complainants.

J. Edgar McDonald, R. C. Gill, Donat L. Turkal, James L. Taplin, and *J. Raymond Hoover* for defendants.

REPORT PROPOSED BY ARNOLD J. ROTH, HEARING EXAMINER—June 26, 1957

In the prior report in the title proceeding, 288 I.C.C. 793, the Commission, division 2, found that the rates on crude asbestos and asbestos fiber, in carloads, from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte, N. C., had not been shown to have been or to be unjust and unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they [fol. 207] exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceeding was first reopened for oral argument before the Commission and reconsideration, and upon petition of the complainant was thereafter by order of July 30, 1954, reopened for further hearing.[2]

In the title proceeding, the complainant, a corporation engaged at Charlotte, in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed June 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines to Charlotte were and are unjust, unreasonable, and unduly prejudicial. The Commission is asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*. In No. 31684, the same complainant, by complaint filed

[2] On further hearing in No. 30846.

December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory and in western territory adjacent thereto are unduly preferential of complainant's competitors located in those territories. The Commission is asked to prescribe lawful rates for the future.

[fol. 208] In No. 31683, by complaint filed December 6, 1954, and in Nos. 31685 and 31686, by complaints filed December 13, 1954, the complainant corporations, which likewise engage in the manufacture, sale, and distribution of asbestos textile products, at North Charleston, S. C., and Marshville and Davidson, N. C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada, to North Charleston, Marshville, and Davidson, were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins to destinations in official territory and in western territory adjacent thereto are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is also engaged in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are unlawful in like respects. These complainants ask the Commission to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

Further hearing in the title proceeding and hearing in the other proceedings was had on a consolidated record, and briefs were filed by the parties. The defendants in their briefs rely entirely upon their contentions that the Commission is without jurisdiction to determine the issues raised by the complainants, in that international rates are [fol. 209] involved. Determination of the jurisdictional

question is dependent upon a complete understanding of the factual situation and the character of the rates assailed, and will be made later herein after discussion of the evidence presented.

Asbestos is the name generally applied to a group of naturally fibrous forms of serpentine or amphibole minerals. In some varieties it has the characteristics of silk or cotton, and it can be spun into thread and woven into fabrics, but it is unique in that it will not burn. Because of these qualities, it has specialized uses for which no substitutes are available. There are several varieties of asbestos, and they differ considerably in composition and physical properties. The most important commercially is chrysolite, which constitutes about 95 percent of world production. Domestic production of asbestos is negligible, and American manufacturers are dependent upon foreign supplies. The most important commercial production of asbestos of the chrysolite variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide which lies between Danville and East Broughton and embraces most of the origin points here involved. Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke, Quebec, to Valley Junction, Quebec, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, [fol. 210] Quebec, and St. Malachie is on the line of the same carrier extending eastward from Diamond, Quebec. There is no record of movements from St. Joseph, Robertson, Warwick, or St. Malachie.

On the basis of use, asbestos falls into two principal classes, spinning and non-spinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Non-spinning fibers

consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

In the Province of Quebec, asbestos fibers are classified in nine groups, with different grades generally in each group. Crude asbestos is usually picked and prepared by hand, and is the most valuable form of asbestos spinning fiber. It is described as hand-selected cross-vein material essentially in its native or unfiberized form. Miller fibers are graded and classified with a Quebec standard testing machine, under a method adopted by the Quebec producers in 1931. The machine consists of a nest of four aluminum boxes, superimposed one above the other, and numbered from the top down. The bottoms of boxes 1, 2, and 3 consist of brass screens with progressively smaller openings, and box 4 is a receptacle for the fine fibers that fall through the other three boxes. The nest of boxes rests upon a table, and an eccentric is used to provide a horizontal shaking [fol. 211] movement. To make a test, 16 ounces of fiber is put in the top box and the machine is run a specified number of revolutions. At the end of this time, the fiber that remains in each box is weighed, and these weights give the grade of the sample. The longest fibers remain on the first screen, and the shorter fibers, according to their length, remain in boxes 2 or 3, or drop into the lowest box. The more fiber that remains on the top screen and the less fiber in the bottom box, the higher the grade and the greater the value. If, for example, spinning fiber of a specification of 4-7-4-1 is purchased, it means that, in a sample of 16 ounces, 4 ounces will remain in the top box; 7 in the second, 4 in the third, and 1 ounce will go through all the screens into the fourth box. Thus, the figures of the grade represent the proportion, in ounces, of the different lengths of fiber in a sample pound of asbestos. Asbestos fibers of grades testing 0-8-6-2 and higher are generally classified as spinning fibers.

The rates[3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste

[3] Rates are stated herein in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

testing under 0.0.8.8 and over 0.0.5.11, and asbestos refuse and shorts testing 0.0.5.11 or lower. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for rate-making purposes, and Thetford Mines and Danville will hereafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory and points in western territory adjacent thereto the defendants maintain joint through international commodity rates. The [fol. 212] rates from Danville are substantially lower than those from Thetford Mines, although the comparative distances do not vary greatly. To southern destination, however, no joint through rates are maintained, and the complainants are required to pay charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of the joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore, to the destinations here involved, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,[4] where it connects with the Canadian

[4] By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific. See *Canadian Pacific Ry. Co. Lease*, 105 I.C.C. 575, 576.

Pacific. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Dan-
[fol. 213] ville on shipments routed to Marshville through Rouses Point, N. Y., another customs port of entry located about 0.5 miles from the international boundary, at which the shipments are interchanged by the Canadian National with the Delaware and Hudson Railroad Corporation. Until about November 1955 shipments routed from Danville through East Alburgh, and charged at that rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, for operating convenience, and on such shipments no transportation within the United States was performed by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, on crude asbestos are 33 cents minimum 40,000 pounds; on asbestos fiber they are 28 cents minimum 40,000 pounds and 25 cents minimum 80,000 pounds; and on asbestos refuse and shorts they are 14 cents minimum 60,000 pounds and 13 cents minimum 80,000 pounds. On asbestos waste from Thetford Mines to Newport the proportional rates are 20 cents minimum 60,000 pounds and 18 cents minimum 80,000 pounds. On asbestos waste from Danville to Baltimore the joint through international rates are 53 cents minimum 60,000 pounds and 48 cents minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35,[5] minimum 50,000 pounds, asbestos fiber is rated class 35, min-
[fol. 214] imum 30,000 pounds, asbestos shorts and waste testing under 0-0-8-8 are rated class 27.5, minimum 40,000 pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport to the same respective destinations, the class 35 rates are

[5] Class numbers represent percentages of the Docket No. 28300 first class rates.

$1.21, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class rate routing. Because of lesser increases imposed on commodity rates than on class rates, and the adjustments of class rate scales under the Commission's order in Docket No. 28300, this Newport-Charlotte commodity rate ultimately governed the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian [fol. 215] mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are manufactured by concerns with plants at Ambler, Pa., Manville, N. J., North Brookfield, Mass., Chicago, Ill., Meredith, N. H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cincinnati, Ohio, Rutherford, N. J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of one-tenth to one-fourth cent per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint

through international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke, Que., on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents and later 10 cents over the Sherbrooke rates. In September 1954, after a few rates on asbestos fiber had been established on an 80,000 pound minimum to a limited number of points, similar rates were published to all destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the complainants do not have the advantage of [fol. 216] such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds. The table in the appendix hereto compares representative applicable through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston.

It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. Asbestos producers in Quebec on the Quebec Central, on shipments to points in official territory, absorb these rate differences, so that for all practical purposes receivers in that territory receive the benefit of the Canadian National rates. No such absorption is practiced on shipments to southern points. The complainants raise no issue concerning these rate differences as such, but ask only that if relief is afforded them similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distances. For example, the rates on asbestos fiber from Danville to Ogdenburg, N. Y., short-line distance 209 miles, and to Winchester, Va., 700 miles, are the same as the rates shown to Ambler and

Manville, 68 cents minimum 40,000 pounds and 61 cents minimum 80,000 pounds, and the same rates apply to [fol. 217] practically all points in trunkline territory from New York, N. Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thetford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1026 miles, and to Hannibal, Mo., 1149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08 minimum 60,000 pounds and $1.07 minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from Thetford Mines, the combination rates to Davidson are $1.14 minimum 60,000 pounds and $1.12 minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago and 67 cents and 61 cents to St. Louis.

[fol. 218] Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the Docket No. 15879 class rates prescribed for application initially within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official territory points with the class rates and with combinations rates constructed as are the rates to the complainants' destinations. For example, on crude

asbestos from Thetford Mines to Ambler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate $1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

There is production of asbestos at Matheson, Ont., and Vancouver, B. C. The rates on crude asbestos and asbestos fiber from Matheson to Chicago and St. Louis are the same as those from Danville, for comparable distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the Carolina destinations here involved, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana [fol. 219] points; $1.01 to group D embracing Chicago; and 93 cents to group E-4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destinations, the rate to group K was reduced to $1.38, this rate was likewise made applicable to group A points, the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson Calif., for distances approximately 2.5 times the distances to the Carolina destinations, on asbestos fiber are $1.72 and $1.89 minimum 60,000 pounds and $1.28 and $1.45 minimum 80,000 pounds; on asbestos waste they are $1.13 and $1.27 minimum 80,000 pounds; and on asbestos refuse and shorts they are $1.13 and $1.22 minimum 80,000 pounds.

The complainants have lost ground in their efforts to compete in recent years in the sales of asbestos textile products, particularly since the general readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000

pounds. The proportion of industry-wide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first three months of 1955; in 1949 this complainant marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 it had dropped 80.2 percent. Raybestos-Manhattan, Inc., had its [fol. 220] proportion of total industry production drop from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952 the production of asbestos textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production, by 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has maintained generally its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles have been confined to North and South Carolina by the force of competition from official territory producers, and even there the competition is keen.

In April 1949 the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte but the proposal was disapproved. The defendants show that traditionally rates from Canadian origins to points in the [fol. 221] south are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction in the instant proceedings only over the rates factors applicable south-

bound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the south, with which they compare favorably. They contend also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian lines over extension of their lines from border points in Michigan can effect delivery without participation of United States carriers. They admit, however, that to points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, and particularly upon the establishment of the 80,000 pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500 to $1,500 per ton, milled asbestos spinning fibers testing 0-8-6-2 or higher at $300 to $525 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75 to $80 per ton, and assert that [fol. 222] in their view the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories,* 299 I.C.C. 375, and were there found not shown to be just and reasonable and were ordered cancelled. The defendants also show, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of shipments to the Carolina destinations are of spinning grades, that the reverse is true in official and western territory, and that there are few if any shipments of spinning fibers from these origins to points west of Akron, Ohio. Based on the latter circumstances, it was indicated

at the hearing that revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on the spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor carrier competition, but the record is clear that the present rate structure was evolved long before motor competition was a factor.

The complainants argue on brief that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the [fol. 223] prescription of joint through rates from the Canadian origins to their destinations reasonably related to the rate structure maintained in official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, that such rates are not subject to the jurisdiction of this Commission, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to the jurisdiction of the Commission, in view of the fact that these points are ports of entry, that the complainants do not assail only the lawfulness of the rates applicable to that portion of the transportation wholly within the United States, but instead assail the combination rates, and that the complaints therefore present no justifiable issue within the jurisdiction of the Commission and should be dismissed.

Under the Interstate Commerce Act, the jurisdiction of the Commission applies to the transportation here involved only to the extent that it takes place within the United States. It is well settled that the railroads operating within the United States have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate*

Co. v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15. The Commis- [fol. 224] sion has no jurisdiction to prescribe joint through international rates for application partially within Canada, as sought by the complainants.

The contentions of the defendants proceed from the assumption that the points of Newport and East Alburgh are for all practical purposes border points, and that the rates here in issue conform to the first alternative indicated above. The facts, however, indicate otherwise. East Alburgh is some 3 miles from the border, and Newport is 5 miles beyond it. The proportional rates maintained by the Canadian lines are applicable only on traffic destined to points in the United States, and they obligate these carriers to provide transportation service within the borders of the United States. Jurisdiction is not a concept governed by practical considerations, but is absolute. To the extent, therefore, that transportation within the United States under the proportional rates is performed by the Canadian lines, they are subject to the jurisdiction of the Commission. To hold otherwise would result in the establishment of a jurisdictional no-mans-land, the extent of which would vary from 0.5 miles at Rouses Point to 3 miles at East Alburgh and 5 miles at Newport.

The defendants err, therefore, when they contend that their rates southbound from Newport and East Alburgh are in fact rates applicable from the border. The Commission has jurisdiction to determination the lawfulness of combination rates based upon a point within the United States, to the extent that the total transportation takes place within the United States. See *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365. As the rail lines within the United States may meet their statutory obligations by the establishment [fol. 225] of rates to and from the border, so may the Canadian lines avoid the jurisdiction of the Commission by the establishment of rates applicable only within Canada to the border, which need not be filed with the Commission. Practical considerations of operating necessity in effecting interchange may then come into play as to whether such interchange will be effected on one side of the border or the other. The complainants are entitled to just, reason-

able, and otherwise lawful rates applicable to transportation within the United States, and they are likewise entitled to assail the lawfulness of the actual rates available to them for all of such transportation, rather than, as contended by the defendants, only the factors applicable from East Alburgh and Newport.

The record is clear that the complainants' competitors at Ambler, Manville, Chicago, St. Louis, and other points in official territory are being unduly preferred, to the undue prejudice and disadvantage of the complainants. It is likewise clear that the assailed combination rates are unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to points in the United States. The rates from the Quebec Central mines to St. Louis and Chicago for distances comparable to those from the Canadian origins to the Carolina destinations are generally on the highest levels and appear to represent reasonable maxima. Equitable treatment of the complainants would dictate, however, that they are entitled to rate levels from the Canadian National mines relatively the same as those available to receivers in official territory, in order to remove the preference and prejudice [fol. 226] found to exist. While as indicated above, the Commission has no jurisdiction to prescribe for the future joint through international rates applicable in part within Canada, it may order the removal of undue preference and prejudice to the extent that the transportation takes place within the United States.

The Commission should find that the assailed rates, insofar as the transportation took place within the United States, were and are unjust and unreasonable to the extent that they exceeded and exceed, from Danville, Warwick, Black Lake, Coleraine, Thetford Mines, and East Broughton, $1.32 minimum 50,000 pounds on crude asbestos to Charlotte, Davidson, Marshville, and North Charleston; $1.01 minimum 40,000 pounds and 93 cents minimum 80,000 pounds on asbestos fiber to Charlotte, Davidson, and Marshville, and $1.14 minimum 40,000 pounds and $1.04 minimum 80,000 pounds on asbestos fiber to North Charleston; and to Davidson 62 cents minimum 60,000 pounds and 57 cents minimum 80,000 pounds on asbestos refuse and shorts, and

70 cents minimum 60,000 pounds and 64 cents minimum 80,000 pounds on asbestos waste; all subject to the applicable increases authorized on and after March 12, 1951.

The Commission should further find that the assailed rates from Danville, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton are, and for the future will be, unduly prejudicial to the complainants, insofar as the transportation takes place within the United States, to the extent that the rates from these [fol. 227] origins to Charlotte, Davidson, and Marshville exceed or may exceed the joint rates that are or hereafter may concurrently be maintained on like traffic to Chicago, and to the extent that the rates from these origins to North Charleston exceed or may exceed the joint rates that are or hereafter may be maintained to St. Louis.

The Commission should further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, and were damaged and are entitled to reparation, with interest, in the amount of the difference between the charges collected and those on the bases herein found to have been reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In those instances in which shipments from Danville and Warwick were interchanged by the Canadian National and St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp.* v. *Holton I.-U. R. Co.*, 164 I.C.C. 505, 510.

An appropriate order for the future should be entered, requiring removal of the undue prejudice found to exist, and vacating the prior order entered in No. 30846.

	Crude asbestos				Asbestos fiber			
	From Danville, Que.		From Thetford Mines, Que.		From Danville, Que.		From Thetford Mines, Que.	
	Short line Distance	Rates[1] minimum 40,000 lbs.	Short line Distance	Rates[1] minimum 40,000 lbs.	Rates[1] minimum 40,000 lbs.	Rates[1] minimum 80,000 lbs.	Rates[1] minimum 40,000 lbs.	Rates[1] minimum 80,000 lbs.
	Miles	*Cents*	*Miles*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Manville, N. J.	480	68	521	97	68	61	86	79
Ambler, Pa.	529	68	570	97	68	61	86	79
Chicago, Ill.	907	103	987	132	85	77	101	93
Kirkwood (St. Louis), Mo.	1118		1198		97	87	114	104
Charlotte, N. C.	1042	150	1083	154	134	131	134	131
Davidson, N. C.	1031	149	1072	152	134	131	134	131
Marshville, N. C.	1068	152	1109	156	136	133	136	133
North Charleston, S. C.	1175	159	1216	163	154	151	158	155

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 50,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 30,000 pounds beyond.

[fol. 229]

BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 30846*

THERMOID COMPANY-SOUTHERN DIVISION,

v.

THE BALTIMORE AND OHIO RAILROAD CO., ET AL.

REPLY OF COMPLAINANTS—Filed July 25, 1958

(To Petition of Defendants for Reopening and Reconsideration dated June 13, 1958.)

Come now the complainants in the above entitled proceedings and file this their reply to the Petition of Defendants for Reopening and Reconsideration dated June 13, 1958.

[fol. 230]

PRELIMINARY STATEMENT

We have reviewed and studied Petition of Defendants for Reopening and Reconsideration, dated June 13, 1958, and find that it is a restatement, for the most part, of the contentions of defendants previously advanced, to wit: in the Brief of Defendants on Further Hearing filed by Mr. McDonald under date of May 14, 1956; the Brief on behalf of Canadian National Railroad Company filed by Mr. Hoover under date of April 30, 1956; in the Defendants' Exceptions to report proposed by Arnold J. Roth, Hearing Examiner, filed by Mr. McDonald under date of August 19, 1957; in Exceptions of Canadian National Railroad Company to examiner's proposed report, filed by Mr. Hoover under date of August 19, 1957; and in the Oral

* Also embraces No. 31683, Raybestos-Manhattan, Inc., General Asbestos and Rubber Division v. Baltimore & Ohio R. R. Co.; No. 31684, Thermoid Company-Southern Division v. Same; No. 31685, Union Asbestos & Rubber Co. v. Same; No. 31686, Carolina Asbestos Co. v. Same.

Argument made by Mr. McDonald before the entire Commission on December 10, 1957.

This recapitulation of previous arguments is particularly true in regard to the question of whether or not the Commission has jurisdiction to grant relief in these proceedings. The cases cited by the defendants in the petition, in connection with the jurisdictional issue, are the identical cases heretofore cited by them as set forth above. Nothing new is injected by the defendants in connection with the jurisdictional question. In fact, there is an admission on the part of the defendants that the Commission does have jurisdiction but the plea seems to be that the Commission should refrain from exercising jurisdiction in the instant [fol. 231] case because the language used in some previous decisions seemed to imply that the defendants were under a duty to establish either *joint* through rates or local rates from so-called border points near the international boundary line.

Complainants in their Brief filed May 14, 1956, dealt exhaustively with the "Jurisdiction of the Commission and the Duties and Requirements of the Act as to International Shipments Participated in by United States Carriers." Treatment of the subject will be found in that Brief from Page 12 through Page 48. Complainants also dealt with the subject matter in their Reply to the Defendants' Exceptions to the examiner's proposed report.

Although the entire Commission had the instant case under consideration from December 10, 1957, to May 7, 1958, defendants persist in raising their old arguments, thus we feel constrained to comment briefly thereon.

Before entering upon a further discussion of the jurisdiction question, we desire to discuss the "Resume of the Proceedings" advanced by the petitioners in the pleading of June 13, 1958. The complaints speak for themselves. Nevertheless, we call attention to the statement made on Page 2 of the petition which dealt with the original complaint of Thermoid Company—Docket No. 30846—filed June 22, 1951. On Page 2 it is stated:

> It alleges in effect that the assailed rates to Charlotte are unduly and unjustly preferential of manufacturers located at Chicago, Milwaukee and Waukegan, and

prejudicial to the complainant at Charlotte, in violation of Section 3 of the Interstate Commerce Act.

[fol. 232] Reference to Page 7 of the Thermoid complaint filed on June 21, 1951, will reveal that it was alleged as follows:

> It is respectfully submitted that the above action by the Canadian and New England rail carriers through their rate associations, affords manufacturers located at Chicago, Ill., and other points in Official Territory, unduly and unjustly preferential treatment, and is prejudicial to complainant, located at Charlotte, N. C., in violation of Section 3 (1) of the Interstate Commerce Act.

The attention of the Commission is called to the phrase "and other points in Official Territory".

It is respectively submitted that if it was the intention of the petitioners to imply or argue that the Commission had gone beyond allegations contained in the complaints in relating the Charlotte adjustment to Ambler, Pennsylvania, then certainly such would be entirely without merit.

The Report of the Commission Is Not in Error as to Matters of Law

The petitioners prefaced their discussion of "The report of the Commission is in error as to matters of law" with a statement that " . . . they have no alternative but to seek reconsideration of the Report of the Commission in the hope that they may thereby avoid any necessity for court litigation with respect thereto." This is a renewal of the threat made by Mr. McDonald, on behalf of the defendants, at the Charlotte hearing. At Page 455 of the record the following appears as a statement made by Mr. McDonald:

> From our standpoint, this is a tremendously important case, and it has been apparent from the beginning that [fol. 233] if the wrong conclusion is reached from the Commission's standpoint, whether we like it or not, we are apparently going to wind up before the Supreme Court of the United States.

Should the instant case become involved in court litigation we are confident of the result. The decision of the Commission in this case, and orders entered therein, will be sustained. We have shown conclusively in our Brief of May 14, 1956, and our Reply to Defendants' Exceptions, dated September 30, 1957, to the Proposed Report of the Hearing Examiner, that the Supreme Court of the United States has already spelled out, with particularity, the duties and obligations of the defendant carriers who perform a transportation service in the United States in connection with international shipments moving on a through bill of lading under applicable through rates.

> *News Syndicate Co.* v. *N. Y. Cent. R. Co.*, 275 U. S. 179, 48 S. Ct. 39; *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592; and *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 55 S. Ct. 472

Complainants are of the firm conviction that had the Commission declined to take jurisdiction in this case, then, at request, the courts of the United States would have required the Commission to do so.

We are confident that this Commission will not be intimidated by the threats of the petitioners. It is well able to fend for itself in the courts of the United States, even without the assistance of the Attorney General of the United States and of your complainants, who would certainly become intervenors in the event of court litigation.

The petition of defendants is totally devoid of legal rationale, and obviously so, because the defendants are unable [fol. 234] to construct a legal theory to support their contentions.

On Page 11 it is stated:

> The petitioners concede that under the provisions of Section 1 of the Interstate Commerce Act the Commission has jurisdiction over common carriers engaged in the transportation of persons and property from or to any place in the United States to or from a foreign country, as well as over the transportation of such passengers and property, insofar as such transportation takes place within the United States. The basic

issue to be decided is what constitutes transportation within the United States in a factual situation such as here exists.

At the bottom of the same page it is stated that the petitioners continue to contend that the publication of rates on the involved commodities from East Alburgh and Newport, Vt., the ports of entry through which this particular traffic moves, fulfills the duty imposed under the various provisions of the Interstate Commerce Act. It is their contention, of course, that the publication of local rates from these interior points makes them immune from Commission jurisdiction. As was brought out at the Oral Argument, the defendants admitted that no asbestos traffic originates at East Alburgh and Newport, Vt. The record shows that the bases for the assessed rates from these interior points in many instances are class rates, and in those instances where commodity rates are applicable from East Alburgh and Newport, the bases thereof are the old class rates. It is obvious from the record that the defendant carriers have made no attempt whatsoever to comply with the provisions of the statute even though the duties imposed on them have been clearly spelled out by the Supreme Court in the cases cited above.

[fol. 235] In our previous pleading we have pointed out that it is the statutory duty of the defendants to make and publish applicable rates from the international boundary to United States points, and that such rates from the international boundary must reflect a charge for the transportation service rendered in the United States and that such a charge cannot reflect two terminal charges. Our position in this matter is based squarely on the decisions of the Supreme Court above cited.

Defendants have a statutory duty to make and publish applicable rates from the international boundary to interior United States points. This they have not done, and we therefore must look to their substitute for this, which is the *entire through rate* found to be unreasonable by the Commission. There can be no question that the proximate cause of the complainants' injury and damage, as found by the Commission, was and is violation of the statutory

duty of these defendants. In *News Syndicate Co.* v. *N. Y. Cent. R. Co.*, supra, we have an astoundingly similar factual and legal situation to our instant case. There, as here, defendants published no applicable legal rate from the international boundary to interior United States points. There, as here, complainants were forced to assail the entire through rate. In both instances the defendant carriers voluntarily elected not to publish a rate from the international boundary which would reflect a transportation charge for that part of the transportation service rendered in the United States in connection with a through international shipment moving on a through bill of lading. Instead, in the *News Syndicate Case* they voluntarily elected [fol. 236] to participate in a joint through rate and, in the instant case, they elected to participate in a through rate based on a combination on an interior point in the United States. These voluntary elections were made, of course, at their own peril. Failure to establish lawful rates from the international boundary was a breach of statutory duty. This breach was the proximate cause of complainants in these proceedings having to pay through charges constructed over an interior United States point.

In upholding a position identical to complainants' in the instant case, the Supreme Court of the United States,[10] through Mr. Justice Butler, stated:

> The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City, Section 1 (1) and (2).[1] It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); section 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. Louisville & Nashville R. Co. v. Sloss-Sheffield

[10] *News Syndicate Co.* v. *N. Y. Central R. Co., supra,* pp. 186-188.

Co., 269 U. S. 217, 231, 46 S. Ct. 73, Ed. 242. Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through [fol. 237] charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an "award of damages under the provisions of this act for a violation thereof." Section 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

The defendants in error participated in the making of the *through rate* and actually collected the excessive charges. By their failure to comply with the act, plaintiff in error was compelled to pay charges based on the *through rates*. On the facts stated, the Commission was authorized to hear the complaint, section 13 (1); and had jurisdiction to make the order, section 16 (1). (Emphasis supplied)

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[1] United States Code, title 49, chapter 1, contains the Interstate Commerce Act, preserving the section numbers.

In *Great Northern Ry. Co.* v. *Sullivan,* 294 US 458, at page 460, the Supreme Court stated that combination rates reflect agreement, express or implied, between the connecting carriers to establish a through route for continuous carriage from origin on one to destination on the other. This pronouncement on the part of the court was in line with its stand in *St. Louis S. W. Ry. Co.* v. *United States,* 245 US 136, 139, note 2, 38 S. Ct. 49, 50, note 4, 62 L. Ed. 199, 205, note 4. It is also in line with the pronouncement in *Thompson* v. *United States,* 343 US 549, 72 S. Ct. 978, decided June 2, 1952, where the Supreme Court stated:

[fol. 238] The statutory term "through route," used throughout the Interstate Commerce Act,[10] has been defined by this Court as follows:

> "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. Through carriage implies a 'through rate'. This 'through rate' is not necessarily a 'joint rate'. It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; as where the 'through rate' is the sum of the locals' on the several connecting lines or is the sum of lower rates otherwise separately established by them for through transportation. *Through Routes and Through Rates*, 12 ICC 163, 166." [11]

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[10] 49 U.S.C. par. 1(4), 6(1), 15(3, 4, 8), 49 U.S.C.A. par. 1(4), 6(1), 15(3, 4, 8); 49 U.S.C. (Supp. IV) par. 5b(4), 49 U.S.C.A. par. 5b(4).

[11] St. Louis Southwestern R. Co. v. United States, 1917, 245 U.S. 136, 139, note 2, 38 S.Ct. 49, 50, 62 L. Ed. 199. See also Great Northern R. Co. v. United States, D.C. Del. 1948, 81 F. Supp. 921, 924, affirmed, 1949, 336 U.S. 933, 69 S.Ct. 750, 93 L. Ed. 1093.

Thus it will be seen that there is no legal distinction between a *joint through rate* and a *through rate*.

To continue, it must be further remembered that reparation is prayed for in these complaints and has been awarded by the Commission. Clearly, for the granting of such reparation, it is necessary for the Commission to find the through rates as a whole, from the Canadian origins to the southern destinations to be unjust and unreasonable. Taking the law as laid down in the *News Syndicate Co.* v. *N. Y. Cent. R. Co. Case, supra*, one step further, we find that where two proportional rates are involved the jurisdiction of this Commission and the law as stated in the [fol. 239] above case still applies. This is particularly significant since this is a case where defendant carriers had actually established a rate as called for by the law and

still the Supreme Court finds that they must look at the reasonableness of the entire through rate as a whole.

In *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 55 S. Ct. 472, the Court, again speaking through Mr. Justice Butler, stated that, "The shipper's only interest is that the charge shall be reasonable as a whole." The decision concisely answers the questions raised in the instant case and reaffirms the cases previously cited by complainants, as follows:

> If defendant's proportional added to that established by the Canadian Pacific had produced an unjust rate, then to the extent that the total charge was excessive, plaintiff would have been subjected to a disadvantage in competing with others selling fuel in the same territory. The Commission has power to determine rates to be unreasonable in violation of section 1 (49 USCA, Sec. 1) without determining whether their application has resulted or will result in pecuniary loss or damage to the shipper. It may determine whether a proportional constituting a part of a combination rate violates section 1 without passing upon the validity of the rate as a whole. Atchison, T. & S. F. Ry. v. United States, 279 U. S. 768, 776, 49 S. Ct. 494, 7 L. Ed. 947. But the Commisson may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable. News Syndicate Co. v. N. Y. C. R. R., supra, page 187 of 275 U. S., 48 S. Ct. 39. And defendant, enforcing an unlawful charge to be divided between it and the Canadian Pacific, would be liable as a joint tort-feasor for the full amount of the excess. Louisville & N. R. R. Co. v. Sloss-Sheffield Co., 269 U. S. 217, 231, 46 S. Ct. 73, 70 L. Ed. 242, et seq. News Syndicate Co. v. N. Y. C. R. R., supra. Lewis, etc., Co. v. Southern Pac. Co., supra.
>
> [fol. 240] But the claim before us has no such foundation. Plaintiff seeks to recover the difference between the proportional established by defendant and that found by the Commission to be just and reasonable notwithstanding its fuel was hauled from mines to

> the competitive field for a just and reasonable charge. That position cannot be maintained for as to the shipments here involved the Great Northern proportional cannot be applied save as it is a part of the through rate. There was a single charge which, though based on the combination rate, was precisely the same in amount as if the rate had been jointly made. As shown by our decision in Louisville & N. R. R. Co. v. Sloss-Sheffield Co., supra, page 234, of 269 U. S., 46 S. Ct. 73, the division among connecting carriers of charges based on joint rates—those involved in that case were constructed out of existing proportionals—is no concern of the shipper. The proportionals here involved are but parts of a through rate and cannot be distinguished from divisions of a joint rate. Morrell & Co. v. N. Y. C. R. R. Co., 104 I. C. C. 104, 128. The shipper's only interest is that the charge shall be reasonable as a whole. It follows that retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff. Louisville & N. R. R. Co. v. Sloss-Sheffield Co., supra, page 234 of 269 U. S., 46 S. Ct. 73. Parsons v. Chicago & Northwestern Ry., 167 U. S. 447, 460, 17 S. Ct. 887, 42 L. Ed. 231.

In *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592, the Court clearly indicated that in order to comply with the statutory duty imposed by the Act in connection with rates from the international boundary to interior United States points, only one terminal service must be reflected in such rates. In that case, where such a rate reflected two terminal services, the Court unequivocally declared that the carrier violated the Act by failing [fol. 241] to maintain a proper rate covering transportation from the international boundary to interior United States points which reflected only *one terminal service.* The Court further stated as follows:

> The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the

foreign carrier and that of the defendant touch the boundary or, in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not apply to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that, if any tariff covering that part of the through service existed, defendant would have produced it; and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the act. It follows that the lower court erred in distinguishing this case from the News Syndicate Co. v. N. Y. C. R. R., supra. That case controls this one.

Even though we were to assume that Newport and East Alburgh, Vermont, were on the international boundary line, still the factors provided by the defendants from those points to the southern destinations do not square with the duty imposed on them by the Interstate Commerce Act, in that, as noted above in the *Lewis-Simas-Jones* Case, the [fol. 242] Supreme Court has said that in order to comply with the Act, the rate from the international boundary must not reflect two terminal charges.

It cannot be denied that the rates from Newport and East Alburgh, Vermont, reflect two terminals for, as shown by the record, the commodity rates applicable on asbestos fibre to Charlotte, Marshfield, and Davidson, are nothing more or less than the old Docket 21665 class rates. On crude asbestos to all four destination, the applicable

rates from the said points in Vermont are the Docket 28300 local class rates. In the case of North Charleston, the applicable rates on the asbestos fibre from the said Vermont points are also the applicable Docket 28300 rates. Full explanation of the basis for all of these rates from the Vermont points to the southern destinations is outlined by Mr. Gillin his testimony given at the Washington, D. C., hearing. This testimony begins with the last paragraph, Page 576 of the transcript of record.

Under the law it is complainants' right to assail the through transportation charge from the Canadian origins to the Carolina destinations participated in and assessed by carriers subject to this Commission's jurisdiction. Reparation is involved. It is clear from the authorities cited that if complainants had restricted their complaint to the factor south of Newport and East Alburgh, Vermont, this Commission could not grant complainants reparation in connection with Section 1.

It is also clear that the Commission need make no finding whatsoever which deals solely with the factor south of the [fol. 243] international boundary. This is true even though that factor was published strictly in conformity with the requirements which the Supreme Court stated must be observed if the carriers are to comply with the duty imposed on them by the Act under Section 1 thereof in establishing rates for the shippers use from the international boundary to the ultimate destination in the United States. *News Syndicate Co.* v. *N. Y. Cent. R. Co.*, (*supra*); *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592.

Defendants seem to be of the opinion that since it is established law that this Commission cannot prescribe a through rate from the Canadian origin to southern destinations, it is totally helpless to order removed any unlawfulness in the rate structure which it might find. This position is unsound since the Commission has authority to issue cease-and-desist orders both under Sections 1 and 3 of the Act. *Consolidated Mining & Smelting Co. of Canada* v. *N. Y. Central R. Co.*, 299 I. C. C. 231.

We are unable to conceive of a clearer portrayal of existing law in this area.

Were the Commission to adopt the contentions of the defendants, it would result in the absurdity of the Commission's giving the defendants the right to determine Commission jurisdiction. Under their contention, should the defendants desire that the Commission have jurisdiction, they would simply publish joint through rates and file the same in a tariff with this Commission. Should they desire [fol. 244] to withhold jurisdiction from the Commission, they would simply enter into some other kind of arrangement reflecting some type of combination rates made either through use of proportionals—or proportionals and local rates. As we have seen, a *through rate* is a *through rate* regardless of whether it is a joint *through rate* or one reflecting combinations. It is the total charge which the complainants are forced to pay which must be assailed. This is in accordance with the doctrine of the *Sullivan case.*

Principles of statutory construction and previous construction by this Commission really have no place in this case. The duties imposed on the defendants are not ambiguous but, rather, are clearly expressed in both the Act and prior decisions of the Supreme Court, as cited. Insofar as we are concerned it is immaterial if, in some cases in the past, the Commission has seen fit *not* to exercise its jurisdiction, but surely, defendants cannot contend that this constitutes a waiver by the Commission of its jurisdiction in subsequent cases where the issues have been clearly drawn, briefed and argued.

We would respectfully submit that this argument of the defendants when brought to its logical conclusion strikes at the very foundation of the existence and authority of this Commission.

As the Hearing Examiner stated in his Proposed Report:

> Jurisdiction is not a concept governed by practical considerations, but is absolute.

The petitioners attempt to belittle the cases relied on by the Commission. The jurisdiction of the Commission covers abandonment, rates, charges, rules, and practices of every form and nature.

[fol. 245] Much is said in the petition regarding the Commission's prior concern over the issue. We respectfully suggest to the Commission that for the most part the cases cited by the petitioners were rendered by the Commission prior to the full development of the law and jurisdiction of this Commission by the Supreme Court in *News Syndicate Co.* v. *N. Y. Central R. Co.*, 275 U.S. 179, 48 S. Ct. 39; *Lewis-Simas-Jones Co.* v. *Sou. Pacific Ry. Co.*, 283 U. S. 654, 51 S. Ct. 592 and *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, 55 S. Ct. 472.

What we have said applies equally to the jurisdiction of the Commission over the Canadian lines. We reiterate that the Commission has jurisdiction over the Canadian lines to the extent that they perform a transportation service in the United States. Defendants cannot escape from this conclusion. See Appendices A, B and C.

The order of the Commission is a cease and desist order coupled with an order to pay damages. The jurisdiction and authority of the Commission to award damages was thoroughly discussed by the Supreme Court in the *News Syndicate Case*. The legal theory supporting that authority was there clearly revealed.

In the case cited it was stated:

> Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an 'award of damages under the provisions of this act for a violation thereof.' Section [fol. 246] 16 (1). And it was the duty of the Commission to ascertain the damages sustained. It is obvious that, in the ascertainment of damages, the Commission had jurisdiction to determine the reasonableness of the charges exacted.

We also refer the Commission to the decision of the Supreme Court in the *Sullivan Case*. Combination rates

were there involved. The same legal theory was applied by the court as that applied in the *News Syndicate Case.*

It has often been said that Congress enacted the Interstate Commerce Act so as to prevent abuses of every form and description. Can it be said that the Commission is without authority to enter a cease and desist order to prevent carriers, subject to its jurisdiction, from continuing practices and policies which are clearly in violation of the law? Is the Commission so helpless? We think not.

The defendant railroads are maintaining joint through rates to official territory destinations. Certainly it is within the province of this Commission to prevent discriminations of all types and eliminate undue preferences. This it has done appropriately. The order runs to carriers performing a transportation service in the United States. It does not purport to tell the Canadian lines what they might do except to the extent that they perform a transportation service in the United States.

The petitioners alleged that the Commission has committed an error in that there is a "changed concept" of [fol. 247] Commission jurisdiction and that this concept has been made retroactive. In the first place there is no "changed concept" which has been spelled out by the Commission since the decisions of the Supreme Court in the three cases cited above were rendered. *What defendants are trying to do is to take statements out of context from Commission decisions rendered prior to the major Supreme Court cases in this field and benefit from the confusion which they themselves have created.*

The defendants were placed on actual notice as to their duties in this area ever since November 21, 1927, when the Supreme Court rendered its decision in *News Syndicate Co.* v. *N. Y. Central R. R. Co., supra.* Further, ever since May 25, 1931, the defendants were placed on actual notice as to the precise nature of the rate which must be maintained from the international boundary line which would reflect a charge for the transportation service rendered on an international shipment from the international boundary line, when the Supreme Court rendered its decision in *Lewis-Simas-Jones Co.* v. *Southern Pac. Co., supra.*

Reference by defendants to decisions of the Commission

which were made prior to a clear revelation of the law by the Supreme Court are of no value to the Commission or to the parties at this time. It is the law which is presently applicable in which we are interested, and that law is clear. Actually, the facts of record reveal that the defendants have not complied with the duty imposed on them by the Interstate Commerce Act and, as a result thereof, the com- [fol. 248] plainants have been unduly damaged.

The Commission Did Not Commit an Error as to Matters of Fact

We have heretofore pointed out that the original complaint of the Thermoid Company not only alleged that the rates maintained to Chicago, Waukegan and Milwaukee were unjustly preferential and unjustly prejudicial to Thermoid at Charlotte, but it also made the same allegation in connection with rates maintained by defendants to points in official territory. The complaint did not have to be amended in any respect.

Now in regard to the contention that the rates to official territory are water and motor truck compelled, it need only be said that the record was clear that such is not the case and the Commission has so found.

The Commission and the courts in the past have made it plain that the best criteria with which to measure the lawfulness of any given assailed rates are the rates maintained on the same commodity in the same general areas and which apply on traffic moving under substantially similar transportation conditions. That is the criteria the Commission used in the instant case. The record shows conclusively that the assailed rates, insofar as they apply on transportation within the United States, are unlawful.

Comments on Petitioners "Conclusion and Requested Findings"

Petitioners assume that they have published reasonable and lawful rates applicable from the border. This they [fol. 249] have not done. We reiterate that even if the tariffs of the defendant carriers had made the rates applicable from the international boundary line which are

now applicable from East Alburgh and Newport, still such rates would be unlawful since those rates include charges for two terminals. These rates are local rates and apply on traffic originating at the said points and, of course, if the rates were published to apply from the international boundary line, such rates would still reflect two terminals. In the *Lewis-Simas-Jones Case* the court made it clear that such rates would be unlawful.

The Petitioners say that the Commission is impractical and unrealistic in this case because if the decision of the Commission is to stand, the defendants would have to publish rates from the international boundary line. There is nothing whatsoever to this argument. The Commission is asked to take judicial notice of the Tariffs and certain Items which are on file at this moment with the Interstate Commerce Commission and shown herein as Appendices A, B and C. These items show that the defendants are publishing rates from the actual international boundary line. We make no comment as to the lawfulness of these rates since we do not know at this time whether or not the said rates inherently contain two terminal charges. We simply say that there is nothing to this argument advanced by the defendants.

We call the attention of the Commission to the fact that the Tariffs and Items shown in Appendices A and B show [fol. 250] conclusively the carriers transporting property within the United States to or from the international boundary. In the case of Derby Line, Vt., located just north of Newport, Vt., on the Quebec Central, the Items and Tariffs referred to in Appendices A and B show conclusively that it is the Quebec Central which performs the service from the international boundary line. Attention is also called to East Alburgh, Vt., which is located on the Central Vermont Railway. There it is shown that the carrier transporting the property within the United States to or from the international boundary line is the Grand Trunk-Eastern Lines.

Attention is also called to the provisions in connection with Rouses Point, N. Y. Here again it is conclusively shown that there is a transportation service performed in

the United States between Rouses Point and the international boundary line.

We believe that this is a complete answer to the defendants' argument that the Commission has no jurisdiction over these Canadian lines. By their own tariffs on file with this Commission—*They Admit*.

Conclusion

We respectfully submit that the Commission has correctly decided the instant case. The Commission has had the benefit of extensive legal research on the part of both the defendants and the complainants. No doubt the Commission has made its own research for this is an important case and the issue of jurisdiction has been clearly drawn. The defendants elected to rely on the point of [fol. 251] jurisdiction and did not attempt to justify the assailed transportation charges insofar as they take place in the United States. Certainly it is that the Commission has not committed any errors in law or in fact. Complainants are entitled to reparation and also entitled to a cease and desist order as spelled out by the Commission in the instant case.

Wherefore, complainants respectively request the Commission to deny the Petition of Defendants for Reopening and Reconsideration dated June 13, 1958.

Respectfully submitted,

Thermoid Company—Southern Division, Raybestos-Manhattan, Inc.—General Asbestos and Rubber Division, Union Asbestos and Rubber Company, Carolina Asbestos Company, By: E. B. Ussery, Harvey L. Golden, Attorneys, H. V. Fleming, Practitioner.

Due Date July 28, 1958

E. B. Ussery, Harvey L. Golden, Security Federal Building, Columbia 1, South Carolina.

H. V. Fleming, 111 Builders Building, 314 West Trade St., Charlotte, North Carolina.

[fol. 252]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by first class mail, a copy thereof properly addressed to each other party, dated at Columbia, South Carolina, July 24, 1958.

E. B. Ussery, Attorney.

[fol. 253]

Appendix A

EXCERPT FROM TRUNK LINE TERRITORY TARIFF BUREAU (TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, AGENT), FREIGHT TARIFF NO. E/S-1008, I.C.C. NO. A-946 (Boin Series)

Item 330B, page 4 of Supplement 49

APPLICATION OF RATES AND ROUTES TO AND/OR FROM THE INTERNATIONAL BOUNDARY BETWEEN UNITED STATES AND CANADA

The class rates and/or routes named in this tariff, from and or to points named below will apply also from and/or to the point in the United States located on the International Boundary adjacent to points named below at which the carrier transporting the property from Canada, or from the United States to or via said point, crosses the boundary.

International Boundary Adjacent to	Carrier transporting property within the United States to or from International Boundary
Ashtabula, Harbor, Ohio	
PRR	Pa-OTCo.
Black Rock, N. Y.	
DL&W	C&O(PMD), GT-E, NYC(M), Wab.
Erie	GT-E, NYC(M), Wab.
GT-E	GT-E
NYC	GT-E, NYC(M), Wab.
Buffalo, N. Y.	
B&O	C&O(PMD), GT-E, NYC(M), Wab.

International Boundary Adjacent to	Carrier transporting property within the United States to or from International Boundary
Erie	C&O(PMD), GT-E, NYC(M), Wab.
GT-E	GT-E
NYC	GT-E, NYC(M), Wab.
NYC&StL	C&O(PMD), GT-E, NYC(M), Wab.
PRR	C&O(PMD), GT-E, NYC(M), Wab.
Constable, N. Y.	
NYC(E)	NYC(E)
Derby Line, Vt.	
QC	QC
Detroit, Mich.	
C&O(PMD)	C&O(PMD), GT-E, NYC(M), Wab.
D&TSL	C&O(PMD), GT-E, NYC(M), Wab.
DT&I	C&O(PMD), GT-E, NYC(M), Wab.
GT-W	GT-E, NYC(M)
NYC(M)	C&O(PMD), GT-E, NYC(M), Wab.
NYC(W)	C&O(PMD), GT-E, NYC(M), Wab.
PRR	C&O(PMD), GT-E, Wab.
Wab	C&O(PMD), GT-E, NYC(M), Wab.

[fol. 254]

East Alburgh, Vt.	
CVt	GT-E
Fort Covington, N. Y.	
GT-E	GT-E
Fort Fairfield, Me.	
CP(E)	CP(E)
Highgate Springs, Vt.	
CVt	CVt.
Houlton, Me.	
CP(E)	CP(E)

International Boundary Adjacent to	Carrier transporting property within the United States to or from International Boundary
Lowelltown, Me.	
CP(E)	CP(E)
Missisquoi, Vt.	
CP(E)	CP(E)
North Derby, Vt.	
QC	QC
North Troy, Vt.	
CP(E)	CP(E)
Norton, Vt.	
GT-E	GT-E
Ogdensburg, N. Y.	
NYC(E)	CPC-PT
Port Huron, Mich.	
C&O(PMD)	C&O(PMD), GT-E
GT-W	GT-E
Richford, Vt.	
CP(E)	CP(E)
CVt	CP(E)
Rouses Point, N. Y.	
CVt	(82)D&H, GT-E
GT-E	GT-E
Rut	(82)D&H, GT-E
D&H	(81)D&H, (80)GT-E
Rooseveltown, N. Y.	
NYC(E)	NYC(E)
Suspension Bridge, N. Y.	
Erie	C&O(PMD), GT-E, NYC(M), Wab.
GT-E	GT-E
LV	C&O(PMD), (76)GT-E(75) LV, NYC(M)(76) Wab.
NYC(W)	C&O(PMD), GT-E, NYC(M), Wab.
[fol. 255]	
Van Buren, Me.	
B&Ar	B&Ar.
Vanceboro, Me.	
CP(E)	[redacted]P(E)
MeC	CP(E)

(76) On traffic for delivery to LV.

(75) On traffic for delivery to GT-E or Wab.

(80) Applicable only on traffic interchanged between D&H and GT-E.

(81) Applicable only on traffic interchanged between D&H and NJ.

(82) Applicable only on traffic interchanged between CVt or Rut on one hand and NJ on the other.

[fol. 256] Appendix B

EXCERPT FROM TRUNK LINE TERRITORY TARIFF BUREAU, TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, AGENT, TARIFF 44-I, I.C.C. A-800 (Boin Series)

Item 665B, page 17 of Supplement 244

APPLICATION OF RATES AND ROUTES TO AND/OR FROM THE INTERNATIONAL BOUNDARY BETWEEN UNITED STATES AND CANADA

The class rates and/or routes named in this tariff, from and/or to points named below will apply also from and/or to the point, in the United States located on the International Boundary adjacent to points named below at which the carrier transporting the property from Canada, or from the United States to or via said point, crosses the boundary.

International Boundary Adjacent to	Carrier transporting property within the United States to or from International Boundary
Black Rock, N. Y.	
DL&W	C&O(PMD), GT-E, NYC(M), Wab.
Erie	GT-E, NYC(M), Wab.
GT-E	GT-E
NYC	GT-E, NYC(M), Wab.
Buffalo, N. Y.	
B&O	C&O(PMD), GT-E, NYC(M), Wab.
Erie	C&O(PMD), GT-E, NYC(M), Wab.
GT-E	GT-E

International Boundary Adjacent to	Carrier transporting property within the United States to or from International Boundary
NYC	GT-E, NYC(M), Wab.
NYC&StL	C&O(PMD), GT-E, NYC(M), Wab.
PRR	C&O(PMD), GT-E, NYC(M), Wab.
Constable, N. Y., NYC(E)	NYC(E)
Derby Line, Vt. QC	QC
East Alburgh, Vt. CVt.	GT-E
Fort Covington, N. Y. GT-E	GT-E
Fort Fairfield, Me. CP(E)	CP(E)
Highgate Springs, Vt. CVt.	CVt.
Houlton, Me. CP(E)	CP(E)
Missisquoi, Vt. CP(E)	CP(E)
North Derby, Vt. QC	QC
[fol. 257]	
North Troy, Vt. CP(E)	CP(E)
Norton, Vt. GT-E	GT-E
Ogdensburg, N. Y. NYC(E)	CPC-PT.
Richford, Vt. CP(E)	CP(E)
CVt	CP(E)
Rouses Point, N. Y. CVt	e D&H, GT-E
GT-E	GT-E
Rouses Point, N. Y. Rut	e D&H, GT-E
D&H	d D&H, e GT-E

International Boundary Adjacent to	Carrier transporting property within the United States to or from International Boundary
Rooseveltown, N. Y.	
NYC(E)	NYC(E)
Suspension Bridge, N. Y.	
Erie	C&O(PMD), GT-E, NYC(M), Wab.
GT-E	GT-E
LV	C&O(PMD), b GT-E, a LV, NYC(M), b Wab.
NYC(W)	C&O(PMD), GT-E, NYC(M), Wab.
Van Buren, Me.	
B&Ar.	B&Ar.
Vanceboro, Me.	
CP(E)	CP(E)
MeC	CP(E)

a—On traffic delivery to GT-E or Wab.
b—On traffic for delivery to LV.
c—Applicable only on traffic interchanged between D&H and GT-E.
d—Applicable only on traffic interchanged between D&H and NJ.
e—Applicable only on traffic interchanged between CVT or Rut on one hand and NJ on the other.

[fol. 258] Appendix C

EXCERPT FROM NEW ENGLAND TERRITORY RAILROADS TARIFF BUREAU, TRAFFIC EXECUTIVE ASSOCIATION—EASTERN RAILROADS, AGENT, TARIFF 47-E, I.C.C. 610 AND SUPPLEMENT 82 THERETO:

Item 290-A, page 14 of Supplement 82

PAPER, NEWSPRINT, FROM THE INTERNATIONAL BOUNDARY—APPLICATION OF RATES

The rates and routes named in this tariff on Newsprint Paper, carloads, from Ogdensburg, N. Y., and Rouses Point, N. Y., will apply also from the station located on the International Boundary adjacent to Ogdensburg, N. Y., and Rouses Point, N. Y., at which the carriers transporting the property from Canada, to or via said station, crosses the boundary.

[fol. 259] [File endorsement omitted]

BEFORE THE
INTERSTATE COMMERCE COMMISSION

No. 30846*

THERMOID COMPANY—SOUTHERN DIVISION,

v.

THE BALTIMORE AND OHIO RAILROAD CO., ET AL.

REPLY OF COMPLAINANTS—Filed March 11, 1959
(To Petitions of Defendants dated February 20, 1959.)

E. B. USSERY,
HARVEY L. GOLDEN,
Attorneys,
Security Federal Building,
Columbia, S. C.

H. V. FLEMING,
Practitioner,
111 Builders Building,
314 West Trade St.,
Charlotte, N. C.

Dated at:
Columbia, S. C.,
March 4th, 1959.
Due Date: March 12, 1959.

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* Also embraces No. 31683, Raybestos-Manhattan, Inc., General Asbestos and Rubber Division v. Baltimore & Ohio R. R. Co.; No. 31684, Thermoid Company—Southern Division v. Same; No. 31685, Union Asbestos & Rubber Co. v. Same; No. 31686, Carolina Asbestos Co. v. Same.

[fol. 260] Come now the complainants in the above-entitled proceedings and file this their reply to the petition of the defendants for leave to file a petition seeking reopening and reconsideration, and, to petition of defendants for reopening and reconsideration, both being dated February 20, 1959.

Complainants respectfully request the Commission to refuse to entertain the petitions of February 20, 1959, filed by the defendants in these proceedings on the grounds that said petitions constitute successive petitions in violation of paragraph (f) of Rule 1.101 of the Commission's General Rules of Practice. Complainants further request that should the Commission entertain the said petitions, it deny them as it did the petition of June 13, 1958, by order dated December 10, 1958.

[fol. 261] I

The defendants' pleadings of February 20, 1959, constitute a successive petition under the provisions of Rule 1.101 of the Commission's General Rules of Practice by the same parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission. The February 20, 1959, pleadings make it clear that these same petitioners by petition dated June 13, 1958, sought the reopening and reconsideration of these proceedings on the ground that the report of the Commission was in error as to matters of law. It is conceded by the petitioners that the June 13, 1958, petition was denied by order of the Commission dated December 10, 1958.

In the February 20, 1959, "Petition For Leave To File a Petition On Behalf of The Defendants Seeking Reopening And Reconsideration" the justification offered for filing a successive petition under Rule 1.101 is that the Commission on October 30, 1958, rendered a decision in *Yellow Jacket Boat Company, Inc.*, v. *Atchison, Topeka & Santa Fe Railway Company et al.*, Docket No. 31990, and that the position of the Commission in the stated case is completely at vari-

ance and wholly irreconcilable with the position taken by the Commission in the instant case.

We have studied the decision of the Commission in the *Yellow Jacket Case, supra,* and conclude the contention of the defendants is without merit. All the Commission there held was where shipments originate at a Canadian point beyond the border and moves on local rates from the border to destinations in this country "the complaint *need not be directed to the rate on the through movement,* but may be directed to the local rate or rates from international bound- [fol. 262] ary:" The complainant had alleged that the local rates from the international boundary to Denison, Texas, was in violation of Section 1 of the Act. The attack was centered upon the domestic rates. The Commission had awarded reparation and the defendants contended that the Commission was without authority to award reparation since the complainant had failed to allege that the through rate or charge was in violation of Section 1 of the Act. The Commission disposed of the contention on the theory that a local rate is complete in itself and since the entire local rate which was assailed was subject to the jurisdiction of the Commission, it was unnecessary for the complainant to attack the through rate. The language used by the Commission makes it plain that the complainant could have proceeded by attacking the through rate. The complainant elected, however, to attack only the local rate and the Commission held that this was permissive.

There is no merit in the contention that the Commission in the *Yellow Jacket case* held that a complaint, if a local rate from the international boundary is involved, *must be directed to the local rate* and not to the through rate on the through movement. This issue was not even before the Commission.

The petition of defendants for reopening and reconsideration dated February 20, 1959, is founded identically upon the same grounds as the former petition of June 13, 1958. Point II of the pleading constitutes the entire pleading other than the "Resume of the Proceeding" and "Conclusion and Requested Findings." Point II alleges that "The Re-

port and Orders Are in Error as to Matters of Law." Petitioners in the June 13, 1958, pleading devoted 47 pages to identically the same point. The only noticeable difference [fol. 263] from a substantive standpoint is that in the February 20, 1959, petition the petitioners deal profusely with the *Yellow Jacket case, supra,* and claim that the decision in the instant case is in direct conflict with the *Yellow Jacket case.* There is no merit in this contention.

II

The entire Commission decided the instant case on May 7, 1958, and the defendants were given until August 14, 1958, to comply with the order entered therein. The petitioners on June 13, 1958, by a duly filed petition requested reopening and reconsideration. The effective date of the order entered on May 7, 1958, was postponed from time to time by the Commission at the request of the petitioners. The order of the Commission denying the petition was entered on December 10, 1958, but through inadvertance was not served on the parties until some time during the first part of January. At that time the defendants were under order to establish the rates ordered by the Commission on or before February 24, 1959. Due to the inadvertance the Commission by order dated January ....., 1959, extended the effective date to March 26, 1959. The original order and all subsequent modifications of the same required that the new rates be made effective on not less than 30 days' notice to the public. Only a few days ago the petitioners requested the Commission to modify the outstanding order so as to permit them to establish the required rates on 10 days' notice to the public. This request the Commission granted.

Conclusion

From the record it is obvious that the petitioners are employing dilatory tactics. They seek to intimidate the Commission and discourage the complainants. At the [fol. 264] Charlotte hearing counsel for the defendants

threatened to involve this Commission and complainants in court litigation if the decision of the Commission in the instant case was not to his liking. This threat was renewed in the June 13, 1958, petition and again in the February 20, 1959, petition at pages 7 and 8. It is stated, and we paraphrase, "We are going to give you another chance to agree with us."

Complainants respectfully submit that the time has come for this litigation to come to an end before this administrative tribunal. Due process of law has been enjoyed by all parties. The entire Commission had ruled twice on the issues involved. Further delay is not justified. The instant petitions violate the provision of paragraph (f) of Rule 1.101 of the Commission's General Rules of Practice. *They should not be entertained.*

Complainants have filed this reply immediately upon receipt of the petitions of February 20, 1959. It is requested that the Commission act immediately on the said petitions and this reply. The required rates under the last order of the Commission must be published and filed with this Commission on or before March 16, 1959, in order for them to become effective on March 26, 1959. Justice requires swift and sure action.

In the event the Commission, in its wisdom, entertains the petitions, then it is respectfully requested that the Commission consider the legal arguments heretofore advanced by the complainants in their Brief of May 14, 1956, in their Reply to the Defendants' Exceptions to the Examiner's Proposed Report, and in their Reply of July 28, 1958, to Petition of Defendants dated June 13, 1958. Complainants feel that it is unnecessary to deal further with the legal argument.

[fol. 265] *Wherefore*, complainants respectfully request the Commission to refuse to entertain the petitions of February 20, 1959, filed by the defendants in these proceedings on the grounds that said petitions constitute successive petitions in violation of paragraph (f) of Rule 1.101 of the Commission's General Rules of Practice. Complain-

ants further request that should the Commission entertain the said petitions, it deny them as it did the petition of June 13, 1958, by order dated December 10, 1958.

Respectfully submitted,

Thermoid Company—Southern Division,
Raybestos-Manhattan, Inc.—General Asbestos and Rubber Division,
Union Asbestos and Rubber Company,
Carolina Asbestos Company,
By: E. B. Ussery,
Harvey L. Golden,
Attorneys.

H. V. Fleming,
Practitioner.

Due Date: March 12, 1959.

E. B. Ussery,
Harvey L. Golden,
Security Federal Building,
Columbia 1, South Carolina.

H. V. Fleming,
111 Builders Building,
314 West Trade St.,
Charlotte, North Carolina.

[fol. 266] Certificate of Service (omitted in printing).

[fol. 267] At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D., 1959

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

ORDER DENYING PETITION FOR RECONSIDERATION—
March 11, 1959

It appearing, That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

It further appearing, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

It is ordered, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

It is further ordered, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

[fol. 268] *And it is further ordered,* That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

Harold D. McCoy, Secretary.

[fol. 269]

IN THE UNITED STATES DISTRICT COURT

HELD AT BURLINGTON, VERMONT

[Title omitted]

ORDER PERMITTING WITHDRAWAL OF CERTAIN PARTIES—April 3, 1959

Upon the annexed Stipulation of Counsel and upon consideration of the matters contained therein, now upon motion of Horace H. Powers, Esq., Attorney for the Plaintiffs herein, it is

Ordered, Adjudged and Decreed, that the following named rail carriers among those listed in Appendix A to the Complaint filed in this case, be and they hereby are withdrawn and dropped as parties plaintiff, without prejudice, to wit:

The Alabama Great Southern Railroad Company

Atlantic Coast Line Railroad Company

The Cincinnati, New Orleans & Texas Pacific Railway Company

New Orleans & Northeastern Railroad Company

Norfolk Southern Railway Company

Seaboard Air Line Railroad Company

Southern Railway Company

Ernest W. Gibson, United States District Judge.

Endorsed: Filed April 3, 1959. Arnold A. Murray, Clerk.

[fol. 270]

IN DISTRICT COURT OF THE UNITED STATES

DISTRICT OF VERMONT

[Title omitted]

ORDER CONVENING THREE JUDGE STATUTORY COURT—
Filed April 8, 1959

There having been presented to the undersigned a complaint of plaintiffs, filed in this Court on the 12th day of March, 1959, wherein plaintiffs apply for a decree permanently suspending, enjoining, setting aside and annulling certain orders of the Interstate Commerce Commission dated May 7, 1958, and February 19, 1959, in a proceeding before it known as Docket No. 30846, *Thermoid Company, Southern Division* v. *Baltimore & Ohio Railroad Company, et al*, which also embraces Docket No. 31683, *Raybestos-Manhattan, Incorporated, General Asbestos and Rubber Division* v. *The Baltimore and Ohio Railroad Company, et al;* Docket No. 31684, *Thermoid Company, Southern Division* v. *The Baltimore and Ohio Railroad Company, et al;* Docket No. 31685, *Union Asbestos and Rubber Company* v. *The Baltimore and Ohio Railroad Company, et al;* and Docket No. 31686, *Carolina Asbestos Company* v. *The Baltimore and Ohio Railroad Company, et al*, and the law requiring and the plaintiffs praying in their complaint that a court of three judges be constituted to hear and determine this cause, and the undersigned having given notice of plain- [fol. 271] tiffs' complaint as required by law to the Honorable Charles E. Clark, Chief Judge of the United States Court of Appeals for the Second Circuit, with the request that he designate two other judges, at least one of whom shall be a Circuit Judge, to constitute, with the undersigned, the Court to hear and determine this cause, and Chief Judge Charles E. Clark, having designated Honorable Sterry R. Waterman, a Judge of the United States Court of Appeals for the Second Circuit, and Honorable James T. Foley, a Judge of the United States District Court for the Northern District of New York, it is hereby

Ordered, that the Honorable Sterry R. Waterman, the Honorable James T. Foley and the undersigned shall serve

as members of and shall constitute the Court to hear and determine this cause and to act in all matters pertaining thereto as provided by law, and that this cause shall come on for hearing before the said Court at such time or times as shall hereafter be fixed upon due notice to the parties.

Ernest W. Gibson, U.S.D.J.

Dated, Brattleboro, Vermont, April 8, 1959.

[File endorsement omitted]

[fol. 272]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION—Filed May 9, 1959

The United States of America and the Interstate Commerce Commission, defendants in the above-entitled proceeding, for answer to the complaint, state:

1.

Admit the allegations of paragraphs I through VI.

2.

Admit the allegations of paragraph VII, except that the Court is respectfully referred to the complaint filed before the Commission in Docket No. 30846 for the contents thereof.

3.

Admit the allegations of paragraph VIII, except that the Court is respectfully referred to the proposed report of the examiner and the report of the Commission, Division 3, for the contents thereof.

4.

Admit the allegations of paragraph IX.

[fol. 273] 5.

Admit the allegations of paragraph X, except that the Court is respectfully referred to the complaints filed by the parties before the Commission for the contents thereof.

6.

Admit the allegations of paragraph XI.

7.

Admit the allegations of paragraph XII, except that the Court is respectfully referred to the report of the Commission for a complete and accurate statement of its findings and conclusions.

8.

Admit the allegations of paragraphs XIII and XIV, except that the Court is respectfully referred to the report of the Commission for a statement of its findings with respect to the basis for determination of reparations and the nature of the preferential rates.

9.

Admit the allegations of paragraph XV, except that the Court is respectfully referred to the report of the Commission for a statement of its findings and conclusions regarding its jurisdiction over the assailed rates.

10.

Admit the allegations of paragraph XVI, except that the Court is respectfully referred to the order of the Commission dated May 7, 1958, for the contents thereof.

11.

Admit the allegations of paragraphs XVII through XIX.

[fol. 274] 12.

Admit the allegations of paragraph XX, except the last sentence, with respect to which defendants aver that the Commission by order dated March 11, 1959, granted the

petition for leave to file a petition seeking reopening and reconsideration, denied the petition for reopening and reconsideration, and clarified the report and order of the Commission as indicated in the order of the Commission dated March 11, 1959, which is attached hereto as the Appendix.

13.

Deny the allegations of paragraph XXI.

14.

Deny the allegations of paragraph XXII, except that the defendants aver that any injuries which may occur to plaintiffs resulting from the lawful and valid orders of the Commission do not constitute a legal basis for instituting or maintaining this suit.

15.

For further answer to the allegations of the complaint, deny that the actions of the Commission challenged in the complaint are unlawful for the reasons specified in the complaint or for any other reason whatsoever; and further aver that the orders of the Commission under attack are valid in all respects.

Except as herein expressly admitted, deny each and every allegation contained in the complaint.

Wherefore, the United States of America and the Inter- [fol. 275] state Commerce Commission pray that the relief prayed for in the complaint be denied and that the complaint be dismissed, and that costs be assessed against the plaintiffs.

John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.
Robert A. Bicks, Acting Assistant Attorney General.
Louis G. Whitcomb, United States Attorney, Rutland, Vermont.
Attorneys for the United States of America.

H. Neil Garson, Associate General Counsel, Interstate Commerce Commission.
Robert W. Ginnane, General Counsel.
Attorneys for Interstate Commerce Commission.

Certificate of Service (omitted in printing).

[fol. 276]

APPENDIX TO ANSWER

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 11th day of March, A. D., 1959.

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

It appearing, That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

It further appearing, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

It is ordered, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

It is further ordered, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

[fol. 277] *And it is further ordered*, That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

Harold D. McCoy, Secretary.

(SEAL)

[File endorsement omitted]

[fol. 278]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

MOTION AND NOTICE OF MOTION OF H. K. PORTER COMPANY, INC.—THERMOID DIVISION—SUCCESSOR IN INTEREST TO THERMOID COMPANY—SOUTHERN DIVISION; RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION; UNION ASBESTOS AND RUBBER COMPANY; AND CAROLINA ASBESTOS COMPANY; FOR LEAVE TO INTERVENE—Filed May 13, 1959

Now Come H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, and move that they be permitted to intervene in this case. As grounds for the motion, petitioners state:

1. That they were parties in interest to the proceedings before the Interstate Commerce Commission in Docket Nos. 30846, 31683, 31684, 31685, and 31686.

2. They have a substantial financial interest in the proceedings.

3. That intervention is necessary in order to permit them to assert the claims and defenses which they deem appropriate in support of their position and legal interests.

4. That a statute of the United States gives petitioners an unconditional right to intervene inasmuch as they were parties in interest to the proceedings before the Interstate [fol. 279] Commerce Commission (28 USCA 2323).

Petitioners' Answer is attached to this Motion.

Dated at the City of Rutland, County of Rutland and State of Vermont this 12th day of May, A. D. 1959.

H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; Carolina Asbestos Company, By John D. Carbine, A Member of the Firm of Ryan, Smith & Carbine, Mead Building, Rutland, Vermont, Attorney for Petitioners for Intervention.

E. B. Ussery, Of Counsel, 608 Security Federal Building, Columbia, South Carolina.

[fol. 280]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL.

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

ANSWER OF INTERVENORS, H. K. PORTER COMPANY, INC.—THERMOID DIVISION—SUCCESSOR IN INTEREST TO THERMOID COMPANY—SOUTHERN DIVISION; RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION; UNION ASBESTOS AND RUBBER COMPANY; AND CAROLINA ASBESTOS COMPANY—Filed May 13, 1959

H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company;

and Carolina Asbestos Company, intervenors in the above entitled proceeding, for answer to the complaint, state:

1.

Admit the allegations of paragraphs I through VI.

2.

Admit the allegations of paragraph VII, except that the Court is respectfully referred to the complaint filed before the Interstate Commerce Commission in Docket No. 30846 for the contents thereof.

3.

Admit the allegations of paragraph VIII, except that the Court is respectfully referred to the proposed report of the examiner and the report of the Commission, Division 3.

[fol. 281]

4.

Admit the allegations of paragraph IX.

5.

Admit the allegations of paragraph X, except that the Court is respectfully referred to the complaints filed by the parties before the Commission for the contents thereof.

6.

Admit the allegations of paragraph XI.

7.

Admit the allegations of paragraph XII, except that the Court is respectfully referred to the report of the Commission for a complete and accurate statement of its findings and conclusions.

8.

Admit the allegations of paragraphs XIII and XIV, except that the Court is respectfully referred to the report

of the Commission for a statement of its findings with respect to the basis for determination of reparations and the nature of the preferential rates.

9.

Admit the allegations of paragraph XV, except that the Court is respectfully referred to the report of the Commission for a statement of its findings and conclusions regarding its jurisdiction over the assailed rates.

10.

Admit the allegations of paragraph XVI, except that [fol. 282] the Court is respectfully referred to the order of the Commission dated May 7, 1958, for the contents thereof.

11.

Admit the allegations of paragraphs XVII through XIX.

12.

Admit the allegations of paragraph XX, except the last sentence, with respect to which intervenors aver that the Commission by order dated March 11, 1959, granted the petition for leave to file a petition seeking reopening and reconsideration, denied the petition for reopening and reconsideration, and clarified the report and order of the Commission as indicated in the order of the Commission dated March 11, 1959, which is attached hereto as the Appendix.

13.

Deny the allegations of paragraph XXI.

14.

Deny the allegations of paragraph XXII, except that the intervenors aver that any injuries which may occur to plaintiffs resulting from the lawful and valid orders of the Commission do not constitute a legal basis for instituting or maintaining this suit.

15.

For further answer to the allegations of the complaint deny that the actions of the Commission challenged in the complaint are unlawful for the reasons specified in the complaint or for any other reason whatsoever; and further [fol. 283] aver that the orders of the Commission under attack are valid in all respects.

Except as herein expressly admitted, deny each and every allegation contained in the complaint.

16.

The intervenors have been illegally charged discriminatory rates and the Interstate Commerce Commission found that they were entitled to reparations in the amount of the difference between the charges collected and those which would have accrued on the bases found by the Commission to be just and reasonable.

Wherefore intervenors pray that the relief prayed for in the complaint be denied and that the complaint be dismissed, and that costs be assessed against the plaintiffs.

Dated at the City of Rutland, County of Rutland and State of Vermont this 12th day of May, A. D. 1959.

H. K. Porter Company, Inc.—Thermoid Division—Successor in Interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; Carolina Asbestos Company, By John D. Carbine, A Member of the Firm of Ryan, Smith & Carbine, Mead Building, Rutland, Vermont, Attorney for Intervenors.

E. B. Ussery Of Counsel, 608 Security Federal Building, Columbia, South Carolina.

[fol. 284]

APPENDIX TO ANSWER

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 11th day of March, A. D., 1959.

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

It appearing, That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

It further appearing, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

It is ordered, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

It is further ordered, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

[fol. 285] *And it is further ordered,* That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

[fol. 286] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 287] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

[Title omitted]

ORDER GRANTING PETITIONERS' MOTION TO INTERVENE—
Filed May 23, 1959

Upon consideration of Petitioners' Motion to Intervene filed May 13, 1959, it is

Ordered: Motion granted. Motion to Intervene allowed accordingly.

Done in Court at Brattleboro, in the District of Vermont, this 22 day of May, 1959.

Ernest W. Gibson, United States District Judge.

[fol. 288]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Argued July 9, 1959.
Finally submitted on briefs, November 1, 1959.
Decided March 7, 1960.

Before: Waterman, Circuit Judge, Foley and Gibson, District Judges.

Horace H. Powers, St. Albans, Vermont: (J. Raymond Hoover, Washington, D.C.; J. Edgar McDonald, New York City; William H. Parsons, Washington, D. C.; John F. Reilly, New York City, of counsel) for Plaintiffs.

Robert W. Ginnane, General Counsel; H. Neil Garson, Assoc. General Counsel, for Interstate Commerce Commission.

Robert A. Bicks, Acting Asst. Atty. General; John H. D. Wigger, Attorney, Department of Justice, Washington, D. C.; Louis C. Whitcomb, U. S. Attorney for Vermont, Rutland, Vermont, for United States of America.

John D. Carbine, Rutland, Vermont; E. B. Ussery, Columbia, South Carolina (Harvey L. Golden, Joseph J. Lipton, Columbia, South Carolina, of counsel) for Intervenors.

OPINION—March 7, 1960

[fol. 289] WATERMAN, *Circuit Judge*:

Ninety-one railroads[1] join in this action to enjoin and annul certain orders of the Interstate Commerce Commission,[2] entered pursuant to a decision of the full Commission reported at 303 ICC 743 (May 7, 1958). A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?

The rates in question pertain to the carriage of asbestos, a transportation originating in the Province of Quebec, Canada, and terminating at various points in North and South Carolina. The principal source of asbestos for United States manufacturers of asbestos products is a narrow belt of land in southern Quebec extending northeast and south-

[1] Originally ninety-eight railroads joined as plaintiffs. However, on April 6, 1959, Judge Gibson issued an order permitting seven southern railroads to withdraw.

[2] Two orders are attacked. They are an Order dated May 7, 1958 that required the railroads to cease and desist from exacting rates held to be unreasonable and prejudicial in the Commission's decision of the same date; and an Order dated February 19, 1959, that amended the effective date of the May 7, 1958 Order.

west approximately fifty miles west of the Maine border. Railroad appears to be the principal method of transporting this asbestos to its American users. The asbestos area of southern Quebec is served by two Canadian railroads, the Canadian National and the Quebec Central. Asbestos intended for consignees in the southern-Atlantic states is carried by the Canadian lines to East Alburg, Vermont, and Newport, Vermont (points respectively 3 and 5 miles south of the international boundary) where the cars are turned over to American railroads in an "interchange" operation. Customs inspection on incoming railroad freight occurs at East Alburg and at Newport; and, to that extent at least, these towns may be regarded as border points.

The Canadian carriers have joined with American carriers in the publication of joint rates for the carriage of asbestos to points in the middle-Atlantic states and the middle-west. However, for the carriage of asbestos to the [fol. 290] southern-Atlantic states the carriers concerned have not published joint rates but instead have published combination rates.[3] One factor of these combination rates is a proportional rate[4] pertaining to the transportation from the mines in Quebec to the Vermont points of interchange. The other factor is a local rate pertaining to the transportation from these points of interchange to the various southern destinations.

In 1951 Thermoid Company, Southern Division, a manufacturer of asbestos textile products, located in Charlotte,

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[3] In railroad parlance, a *joint* rate on a through route differs from a *combination* rate on a through route in that a joint rate is reached through an agreement of the participating carriers and each participating carrier is jointly and severally liable for the entire rate. See Louisville and N.R.R. v. Sloss-Sheffield Co., 269 U.S. 217 (1925) at pp. 231-234.

[4] A *proportional* rate covers a portion of a through route and differs from a *local* rate between the same points in that the proportional rate applies only to transportation on the through route. See Lewis-Simas-Jones Co. v. Southern Pacific R. Co., 283 U.S. 654, 663 (1931). Apparently the rates south of East Alburg and Newport to the Carolinas are merely local rates.

North Carolina, filed with the Commission a complaint alleging that the combination rates for the carriage of asbestos from mines located along the lines of the Quebec Central to Charlotte were unreasonable and were prejudicial in comparison with the joint rates given complainant's competitors in the middle-Atlantic states and the middle-west. As the complaint wound its way upward through the various levels of Commission adjudication, four additional complaints of a similar nature were consolidated with it.[5] In its decision the Commission accepted complainants' contentions. It held that the Quebec-Carolina rates were unreasonable and prejudicial and ordered reparation to the extent that the rates exceeded the rates for comparable distances charged complainants' competitors in the middle-Atlantic states and the middle-west.

We are, of course, without authority to consider the validity of the Commission's orders allowing reparations;[6] and plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. Plaintiffs' argument before this court is confined to the contention that the Commission exceeded [fol. 291] its power in failing to limit its jurisdiction to

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[5] The net effect of the consolidation was to increase the number of complainants to four so that the group then included manufacturers of asbestos products in Charlotte, Davidson and Marshville, North Carolina, and North Charleston, South Carolina and to expand the complaint so as to bring into question the rates from the mines along the Canadian National as well as those from the mines along the Quebec Central.

The four complainants in the proceedings before the Commission have intervened in this action under 28 U.S.C. §2323.

[6] Under 28 U.S.C. §2321 the jurisdiction of a three-judge district court extends to all orders of the Commission save those ". . . for the payment of money or the collection of fines, penalties and forfeitures . . ." Under 49 U.S.C. §16(a) an action for the enforcement of a reparations order is to be brought by the complainant in one of several district courts or in a state court. In United States v. ICC, 337 U. S. 426 (1949) the Supreme Court indicated that the activities of a three-judge district court were to be carefully confined to those expressly provided for by Congress.

the local rate factor from the points of border interchange in Vermont southward to the Carolinas.

The Commission's power with respect to transportation wholly by railroad is set forth in Sections 1(1)(a) and 1(2) of the Interstate Commerce Act, 49 U.S.C. §§1(1)(a), and 1(2). These sections in pertinent part read as follows:

> "Carriers subject to regulation
>
> "(1) The provisions of this chapter shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, . . .
>
> . . . .
>
> . . . "from or to any place in the United States to or from a foreign country, *but only insofar as such transportation* or transmission *takes place within the United States.*"
>
> "Transportation subject to regulation
>
> "(2) The provisions of this chapter shall also apply to such transportation of passengers and property . . . *but only in so far as such transportation* or transmission *takes place within the United States* . . ." (Italics supplied.)

As the Commission emphasized in its decision in the present case, it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into joint rates for international transportation. See *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654, 660 (1931); *Fruit Importers* v. *Atlantic*

Coast Line R. Co., 188 ICC 520, 523 (1932); *International Nickel Co. v. Director General*, 66 ICC 627 (1922). However, it is equally well settled that the Commission does [fol. 292] have power to pass upon the legality of existing joint rates on international transportation, and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation "only insofar as such transportation . . . takes place within the United States."[7] See *Black Horse Tobacco Co. v. Illinois Central R. Co.*, 17 ICC 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co. v. Director General*, 66 ICC 627 (1922). The Supreme Court has upheld the Commis-

[7] Prior to February 28, 1920 Section 1(1) declared the Act to be applicable to carriers engaged in any of four types of international transportation: (1) from the United States to an adjacent foreign country; (2) from the United States through a foreign country to the United States; (3) from the United States to a foreign country when shipment is being carried from an originating point in the United States to a port of transshipment; (4) from a foreign country to the United States when the shipment is being carried to a terminating point in the United States from a port of entry either in the United States or in an adjacent foreign country. In Galveston, H. & S. A. R. Co. v. Woodbury, 254 U.S. 357 (1920), a case decided under Section 1(1) as it existed prior to the 1920 Amendments, the Supreme Court held that transportation *from* an adjacent foreign country to the United States was within the Commission's jurisdiction under the provisions relating to the transportation from the United States to an adjacent foreign country. On February 28, 1920 (Section 400 of the Transportation Act of 1920, 41 Stat. 474) Section 1(1) was amended to apply to transportation: (1) from the United States through a foreign country to the United States, and (2) from or to the United States to or from a foreign country; but only insofar as these two types of international transportation take place within the United States. Section 1(2) quoted in the opinion, was a new section added by the 1920 Act.

sion's interpretation in two cases, *News Syndicate Co.* v. *New York Cent. R. Co.*, 275 U.S. 178 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654 (1931).[8]

The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. The Canadian carriers published proportional rates to East Alburg, Vermont, and Newport, Vermont, the interchange points; and the American carriers published local rates for the remainder of the transportation. The Commission does not dispute plaintiffs' statement that there are no facilities for interchange available between the international boundary and East Alburg and Newport. Nor does the Commission dispute that, as to shipments under the assailed combination rates, the Canadian carriers operate within the United States only for the purpose of turning over the asbestos to American carriers.[9] In its decision the Commission made no findings that the local rates south of the interchange points [fol. 293] were unreasonable or prejudicial. The Commission, nevertheless, held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred

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[8] There is language in News Syndicate, supra, at 186-87, and Lewis-Simas-Jones, supra, at 663, which might be construed as indicating that the Commission would be without jurisdiction over the joint rate if the American carrier had also published a rate for the American portion of the transportation. The Commission, however, has subsequently held that it has jurisdiction over joint rates, irrespective of whatever additional rates may be filed. Carstens Packing Co. v. Great Northern R. Co., 264 ICC 164 (1945); see also Cyanamid and Cyanide from Niagara Falls, Ont., 155 ICC 488 (1929); Publication of Rates between United States and Canada, 147 ICC 778 (1928).

[9] Because the Canadian rate is a proportional rate, it does not apply to any shipments to American consignees at points between the international boundary line and the interchange points, nor does it apply to shipments to be delivered by Canadian carriers to consignees located at the interchange points.

within the United States.[10] The Commission stated its position in the following words:

> "The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. [The Commission's reference is to publication of rates to and from the international boundary.] The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States."

First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada.[11] It is now settled that the Commission need not make this distinction if the inter-

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[10] As to those shipments where the interchange occurred at St. Johns, Quebec, the Commission held that the Canadian carrier was not liable for reparation. Apparently, however, the American carriers were liable for reparation even as to these shipments.

[11] In its decision in the present case the Commission states, at p. 754, that its jurisdiction here exists "regardless of the manner of rate publication." We gather this to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

national transportation is conducted on the basis of a joint rate because the American carriers have elected to become jointly and severally liable for the entire transportation charge, and because a contrary rule would force the Commission to rely upon the unpublished and possibly unverifiable divisions of the joint rate between the American carrier and the foreign carrier. This is not the situation where the American carrier and the foreign carrier each [fol. 294] publish rates to and from a border point where interchange occurs. In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase "but only insofar as such transportation takes place within the United States" will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country.[12]

Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Third, the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holdings support its present position. The Commission relied upon *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 ICC 139 (1934); *Newsprint Paper to Detroit*, 161 ICC 63 (1930); *Simpson Co.* v. *Grand Trunk W. R. Co.*, 129 ICC 430 (1927); *Larrowe Milling Co.* v. *Chatham W. & L. E. R. Co.*, 52 ICC 145 (1919); *Iron and Steel Wire, Buffalo, N.Y. to Kitchener, Ont.*, 294 ICC 515 (1955); and to a lesser extent upon *Control of Hereford Ry. Co.*, 99 ICC 7 (1925) and *Status of Napierville Junction R. Co.*, 266 ICC 471 (1946). In *Fruit Importers, News-*

[12] See note 10, supra.

print to Detroit, Simpson Co., and *Wire, Buffalo to Kitchener*, the assailed rates were joint rates over which the Commission's jurisdiction is conceded. In *Larrowe Milling* [fol. 295] the shipper assailed carload minima concurred in by both the Canadian and American carriers, thus presenting a situation analogous to a joint rate. In *Control of Hereford Ry. Co.*, a case involving the application of an American carrier to acquire control of a line 52.85 miles in length of which all but 0.67 miles were in Canada, and to abandon operations along this line, the Commission held it had authority to approve the acquisition under Section 5(a) but that its abandonment jurisdiction extended only to the trackage within the United States. In *Napierville Junction* the Commission held that a Canadian line whose trackage ended at the international boundary was not subject to the provisions of the Act even though its crews and equipment did conduct some operations on the one mile of track in the United States between the border and Rouses Point, N. Y. These last two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case.

Not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination international rate.[13] In *Albee Fruit*

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[13] Watab Paper Co. v. Canadian National R. Co., 152 ICC 265 (1929) appears to be the single exception to the above statement. Watab involved shipments of pulpwood from Manitoba points of origin approximately thirty miles north of the border to a consignee in central Minnesota. After reaching the interchange point of Warroad, Minnesota, approximately six miles south of the border, the shipments were misrouted so as not to travel along the least expensive routing. In computing damages the Commission held that the factor from the Manitoba points of origin to Warroad was unreasonable. Jurisdiction to make such a holding was premised upon a Section 4 violation, resulting from the fact that the rates from the Manitoba points of origin to Warroad were greater than the rate from the points of origin to International Falls, Minnesota, a point approximately seventy-five miles east of Warroad and a point which shipments from the points of origin could reach only by routing through Warroad. However, the Commis-

Co. v. *Atlantic Coast Line R. Co.*, 293 ICC 785, Montreal consignees of fresh fruit from the Florida area filed complaints as to the combination rates made over Rouses Point, N. Y. In limiting its jurisdiction the Commission stated: "The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." *Hoffman-Taff, Inc.* v. *St. Louis S. F. R. Co.*, 279 ICC 710, 712 (1950) involved rates on shipments of aqua ammoniae from originating points in Canada to Springfield, Missouri. The rates were com- [fol. 296] bination rates made over Detroit and Fort Huron, Michigan, and apparently the complaint attacked only the Canadian portion of the rates. The Commission stated: "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, which for all practical purposes are international border points, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction." In *E. J. Stanton* v. *Atchison, T. & S. F. R. Co.*, 258 ICC 315 (1944) the Commission, after holding the American factors to be reasonable, refused to pass upon the Canadian factors of combination rates on the shipment of lumber from Los Angeles to the Maritime Provinces made over Port Huron, Detroit, Buffalo, and Rouses Point. For cases of similar import see *Dow Chemical Co.* v. *Alton & S. R. Co.*, 284 ICC 365 (1952); *Crelinsten* v. *Railway Express*, 201 ICC 284 (1934); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520 (1932).

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sion recognized that these circumstances were most unusual, stating at p. 268: "Where the rate from a point in Canada to a destination in the United States *is based on a combination of the rates to and from a border point within the United States, our jurisdiction ordinarily extends only to the rate within the United States.*" (Italics supplied).

In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395-97 (1956); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 351-52 (1941).

It is contended that support for the Commission's present interpretation may be found in *Great Northern R. Co.* v. *Sullivan*, 294 U.S. 458 (1935). The *Sullivan* case in-[fol. 297] volved the complaint of a North Dakota consignee of lignite mined in Alberta, Canada. The shipments moved on a combination rate made over an international-border point located within the United States. The Commission awarded reparations upon a finding that the American factor was unreasonable. The Supreme Court reversed, holding that an award of reparations was improper without a finding that the entire rate, i.e., the sum of the American and Canadian factors, was excessive. Thus it is argued that *Sullivan* equated combination international rates with joint international rates for purposes of the Commission's jurisdiction. We believe that a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury. As we read the case the Court held that a complainant seeking reparations by attacking the American factor of a combination international rate must not only demonstrate the unreasonableness of the factor over which the Commission has jurisdiction but also the unreasonableness of the sum of the combined rates.

Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's-land" between the international boundary and the interchange points. This argument is unpersuasive. The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers. If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to

lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 ICC 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 ICC 575 (1926). We merely hold that the carriage of freight by rail on a proportional [fol. 298] rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate.

The orders described in note 2, *supra*, are annulled and set aside, and the cause is remanded for further proceedings in conformity with this opinion.

Sterry R. Waterman, U. S. Circuit Judge.

I concur:

James T. Foley, U. S. District Judge.

I concur:

Ernest W. Gibson, U. S. District Judge.

[File endorsement omitted]

[fol. 302]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

MOTION OF UNITED STATES AND INTERSTATE COMMERCE COMMISSION FOR RECONSIDERATION AND TO ALTER OR AMEND THE JUDGMENT—Filed March 17, 1960

Now come the United States of America and the Interstate Commerce Commission, defendants in the above-styled action, and move the Court, pursuant to Rules 52(b) and 59(e), 28 U.S.C., Federal Rules of Civil Procedure, to open the judgment herein to grant reconsideration and to alter or amend the judgment on the following grounds:

I.

The Court's opinion does not discuss a primary issue in this case, namely, whether the Commission has the authority to order the rail carriers involved in this case to discontinue the maintenance of an unlawful rate relationship which is unduly preferential to certain points in Official Territory and unduly prejudicial to certain points in Southern Territory in violation of section 3 of the Interstate Commerce Act, 49 U.S.C. §3.

[fol. 303]

II.

The effect of the Court's opinion is to immunize from regulation precisely what section 3(1) of the Interstate Commerce Act, 49 U.S.C. §3(1) has empowered the Commission to prevent, i.e., undue and unreasonable prejudice and disadvantage between points and territories. Thus, this opinion would insulate from section 3 of the Act the action of rail carriers operating within the United States which participate in joint rates from points in Canada to certain points in the United States, although refusing to participate in joint rates from the same Canadian origins to other points in the United States. There is no court decision which holds that the Commission's power under section 3 of the Interstate Commerce Act is so circumscribed that it cannot reach this kind of rate discrimination. Nor is there any Commission decision which holds that the Commission's power is so restricted. The fact that the Commission does or does not have jurisdiction with respect to the rates in the area between the International Boundary and the interchange points does not determine the issue of the Commission's jurisdiction to enter the section 3 order which it did in the instant case. Even if it be assumed *arguendo* that the Commission does not have jurisdiction under section 1 of the Act over transportation from the International Boundary to the interchange points involved here, it is submitted that the Commission unquestionably has jurisdiction under section 3 to find that the fact that points in Official Territory have joint rates from Canadian origins while competing points in Southern Territory do not have joint rates from the same origins creates an undue prejudicial-preferential-rate relationship in violation of sec-

[fol. 304] tion 3 of the Act and, accordingly, to order railroads operating within the United States not to continue to participate in such joint rates to one territory unless comparable rates are also established to the other territory.

III.

There is nothing in the Interstate Commerce Act which supports the distinction made by the Court at pages 10-11 of its opinion with respect to the Commission's jurisdiction over the Canadian carriers operating in the United States in regard to finance matters (such as abandonment proceedings) as against rate matters. We submit that once physical jurisdiction is obtained over the rail carriers that such jurisdiction extends to all matters within the purview of the Interstate Commerce Act. Further, it cannot be overemphasized that the effect of the Court's decision is not only that the Commission lacks jurisdiction under section 1 of the Act to hold that the rates to the South are unreasonable, but also that the Commission lacks jurisdiction under section 3 of the Act to order the rail carriers operating in the United States to discontinue participation in joint rates from Canadian origins to points in Official Territory unless joint rates are established from the same Canadian origins to points in Southern Territory.

IV.

Under the Court's determination of the Commission's jurisdiction, none of the rates which have been established by the Canadian carriers applicable between the International Boundary and the interchange points would be subject to the Commission's jurisdiction. Even the Canadian carriers did not make such an allegation either before the Commission or this Court. As a matter of fact, the Cana-[fol. 305] dian carriers from the beginning have filed with the Commission all of their tariffs, class rates, commodity rates, local and others, applicable from points in Canada to the interchange points and between the International Boundary and the interchange points. When the Canadian carriers deemed it necessary, they have applied to the Commission pursuant to section 6 of the Act for permis-

sion to publish tariffs effective on less than the statutory 30 days' notice period. Under the Court's opinion, this would be no longer required of the Canadian carriers for operations between the International Boundary and the interchange points, or from a point in Canada to the interchange points on traffic for local delivery or otherwise. Examples of such tariffs are Tariff No. I.C.C. 444, Quebec Central Railway Company Local Freight Tariff of Class Rates between Quebec Central Railway Stations in the State of Vermont and between those stations and the International Boundary Line. This tariff was published in compliance with the order of the Commission in I.C.C. Docket No. 28300, dated May 15, 1945, as amended; the Sixth Section matter is illustrated by rates on maple sugar from Sherbrooke, Quebec, to Newport, Vermont, for local delivery, Supplement No. 2 to Quebec Central Tariff No. 155-C, I.C.C. No. 452, issued on 10 days' notice under authority of the Commission, Special Permission No. 69072, dated May 29, 1956.

V.

The effect of the Court's ruling will be to establish a no man's land between the International Boundary and the interchange points within the territorial limits of the United States with respect to rates, thus enabling the rail carriers not only to maintain unreasonable rates but also to perpetrate rate discriminations at will, free from control by [fol. 306] the Interstate Commerce Commission. This would create a loophole in the law which, we submit, is not required by the terms of the Interstate Commerce Act, and which would frustrate one of the underlying objectives of the Act, i.e., the elimination of unlawful discrimination between shippers and territories. See *Houston & Texas Ry. Co. v. U.S.*, 234 U.S. 342, at pages 356, 358-360.

VI.

The Court at page 6 of its opinion stated:

> First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no

effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada. * * *

We submit that this statement overlooks two important factors: (1) The Commission did not rule on the lawfulness of the rates from the interchange points to destinations in the South because the complaints before the Commission did not attack the local rates, but were based upon the ground that the rail carriers were unlawfully maintaining unreasonable and discriminatory rates from the Canadian origins to the Southern points by failing to maintain reasonable joint rates to these destination points comparable to those maintained from the same Canadian origins to destinations in Official Territory; and (2) In any case, such a finding could not be made because the rail carriers, in violation of section 6 of the Act, failed to publish rates applicable from the International Boundary to the interchange points and from the International Boundary to points in the South.

[fol. 307] VII.

In any event so far as section 3 of the Act is concerned, the Commission was not required to determine what would have been a reasonable rate from the International Boundary or the interchange points to the South. See *Virginian Ry.* v. *United States*, 272 U.S. 658, 663, 666, 667. The complaints before the Commission charged that there was a violation of section 3 in that the rail carriers failed to maintain joint rates from the Canadian origins to destinations in the South while maintaining such rates from the same origins to competitive points in Official Territory. The Commission determined that the carriers operating within the United States violated section 3 of the Interstate Commerce Act in this respect, and gave them the alternative of discontinuing the discrimination either by terminating the joint rate arrangements, or by establishing similar rates to the South.

VIII.

While the Court's opinion holds that the assailed rates to the South do not come within the jurisdiction of the Commission since they are not joint rates, nevertheless, the rail carriers operating in the United States are participating in a through route, and to this extent such transportation, we submit, would be subject to the Interstate Commerce Commission's regulatory powers. *Thompson* v. *United States*, 343 U.S. 549; *United States* v. *Great Northern R. Co.*, 343 U.S. 562; *L. & N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 233; *United States* v. *Illinois Central R. Co.*, 263 U.S. 515; *St. Louis S.W. Ry. Co.* v. *United States*, 245 U.S. 136, 139. This Court recognizes that railroads which participate in joint rates are jointly and severally liable if the rates [fol. 308] are unlawful, and that, therefore, if the rail carriers had established joint rates from Canadian origins to the South, they would have been liable for any unlawfulness in such rates. The underlying basis for such liability, as stated by the Supreme Court, is that " * * * the establishment of a joint rate by the concurrence of connecting carriers is necessarily the act of each, because the establishment of the rate is done by their joint agreement." *L. & N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 233. Under the same reasoning, carriers that participate in a through route and a through rate, even though such a rate is a combination rate, are also jointly and severally liable if the through rate is unlawful, for the through route " * * * is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *Thompson* v. *United States*, 343 U.S. 549, 556. Here the rail carriers have established through routes and rates from Canadian origins to southern destinations. This traffic is transported on a single bill of lading from origin to destination, and the freight charges are collected by the Canadian rail carriers, which they remit to the United States carriers as their part of the through rate.

IX.

The Court's opinion, in footnote 11, states that it interprets certain language of the Commission—

> * * * to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

[fol. 309] This assertion is accurate and one reason for this is that the rail carriers are, in fact, participating in through routes and rates from the Canadian origins to destinations in the South, and for this reason they are jointly and severally liable for the unlawfulness of the through rates. *Thompson* v. *United States, supra; United States* v. *Great Northern, supra; L. & N.R.R.* v. *Sloss-Sheffield Co., supra.*

X.

The Court at page 7 of its opinion states that " * * * the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side is a fortuitous event, an event upon which the Congress could hardly have intended the Commission's jurisdiction to hinge." However, the Commission made the specific finding that the transportation performed by the Canadian carriers from the International Boundary to the interchange points involved here is substantial. See 303 I.C.C. 743, page 752. We submit that this is a rational finding, and therefore that, in accordance with firmly established principles of judicial review, it should have been left standing. This position is reinforced by the fact that the statute itself does not exempt from its scope any territory within the United States even though that territory happens to be adjacent to the International Boundary.

For the foregoing reasons, it is respectfully submitted that the judgment for the plaintiffs should be vacated and

[fol. 310] set aside and judgment should be entered for the defendants.

Robert W. Ginnane, General Counsel, H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Robert A. Bicks, Acting Assistant Attorney General, Louis G. Whitcomb, United States Attorney, Rutland, Vermont, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C., Attorneys for the United States of America.

Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 311] Telephone 2-1921

E. B. USSERY
Attorney and Counsellor at Law
Security Federal Building
Columbia 1, S. C.

March 15, 1960

Mr. Arnold Murray
Clerk
United States District Court
Burlington, Vermont

Re: Central Vermont Railway, Inc., et al. v. United States and Interstate Commerce Commission, U.S.D.C. Dist. of Vermont—C.A. 2713

Dear Mr. Murray:

The United States and the Interstate Commerce Commission, defendants in above-styled action, are filing a Motion for Reconsideration.

I have read the Motion and as intervening defendant in this case I adopt the points and authorities set forth in

the Motion as though they were my own and further urge upon the Court that the Judgments for the plaintiffs should be vacated and set aside and that Judgments should be entered for the defendants.

The original of this letter is for your file, and the three copies are for the convenience of the Court. Copies of this letter are being served on all parties of record by first class mail. Please indicate on the attached fourth copy of this letter the date of filing and return to me.

Very truly yours,

E. B. Ussery, Attorney for Intervening Defendants.

EBU:ehf
Encl.

Endorsed: Filed March 17, 1960.
Arnold A. Murray, Clerk.

[fol. 312] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

[Title omitted]

ORDER DENYING MOTIONS FOR RECONSIDERATION—
March 26, 1960

The motions for reconsideration filed March 17, 1960 (1) on behalf of the United States of America and the Interstate Commerce Commission, defendants, and (2) on behalf of intervening defendants, are severally denied.

Sterry R. Waterman, U. S. Circuit Judge, James T. Foley, U. S. District Judge, Ernest W. Gibson, U. S. District Judge.

[fol. 313]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL OF H. K. PORTER COMPANY, INC., ET AL., TO THE SUPREME COURT OF THE UNITED STATES—Filed May 5, 1960

I.

Notice is hereby given that the H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, intervening defendants in the above-styled civil action, hereby appeal to the Supreme Court of the United States from the final judgment entered in this action on March 7, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the record made before the Commission filed with the district court, the exhibits submitted by government counsel [fol. 314] and received in evidence by the court July 9, 1959, and the following:

(a) Complaint filed March 12, 1959, by Central Vermont Railway, Inc., et al., plaintiffs, including the exhibits attached thereto;

(b) Order of the court filed April 3, 1959, permitting withdrawal of certain parties' certificates;

(c) Order of the court filed April 8, 1959, designating three-judge statutory court;

(d) Answer of the defendants United States of America and the Interstate Commerce Commission to the complaint;

(e) Motion and notice of motion to intervene by H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(f) Answer of intervenors H. K. Porter Company, Inc. —Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al., to the complaint;

(g) Order of the court filed May 23, 1959, permitting intervention of H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(h) Opinion and judgment of the court filed March 7, 1960;

(i) Motion by the United States of America and the Interstate Commerce Commission for reconsideration and to alter or amend the judgment;

(j) Letter dated March 15, 1960, by E. B. Ussery for intervening defendants, adopting motion for reconsideration by defendants United States of America and Interstate Commerce Commission;

(k) Order of the court filed March 26, 1960, denying motions for reconsideration;

[fol. 315] (l) This notice of appeal.

III.

The following questions are presented by this appeal:

(1) Whether the district court erred in annulling and setting aside an order of the Commission which directed rail carriers operating within the United States to cease and desist from violating Section 3 of the Interstate Commerce Act, 49 U.S.C., Section 3, which found certain rates unreasonable, in violation of Section 1, 49 U.S.C., Section 1, and awarded reparation, *on the ground* that the assailed rates from Canadian origins to southern destinations maintained by the rail carriers over established through routes were not indivisible entities, and that the Commission did not have jurisdiction to consider them as such because *one of the factors* constituting the total through rate which had been assailed and found unlawful was beyond the jurisdiction of the Commission.

(2) Whether the district court erred in holding that the Commission did not have jurisdiction over a proportional rate, filed with the Commission by the Canadian carriers pursuant to Section 6 of the Interstate Commerce Act, 49 U.S.C., Section 6, applying from the Canadian origins to East Alburgh and Newport, Vermont, such rate being duly restricted so as to apply *only* on shipments moving to destinations in the United States to which no through joint rates were published in the tariff.

(3) Whether the district court erred in annulling and setting aside an order of the Commission on the ground that the Commission has no jurisdiction with respect to rates over rail transportation conducted by Canadian carriers between the International Boundary and interchange [fol. 316] points of East Alburgh and Newport, Vermont, which are located, respectively, three and five miles south of the International Boundary;

(4) Whether the district court erred in holding that the operations of the Canadian carriers within the United States between the International Boundary and East Alburgh and Newport, Vermont, the interchange points to which the proportional rate had been published, are sub-

ject to the jurisdiction of the Commission *only* with respect to finance and abandonment matters *but not with respect to proportional rates constituting one factor of a through rate over established through routes to points in the United States;*

(5) Whether the district court erred in holding that the Commission could not properly find unreasonable or unduly discriminatory the assailed total rail charge from Canadian origin points to final destination points in the United States, but was required to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering transportation within Canada even though such a distinction was made impossible by the carriers' method of publishing rates since the carriers failed to publish rates from the International Boundary to points in the United States, including points in official territory as well as points in southern territory;

(6) Whether the district court erred in holding that the Commission has no jurisdiction over the assailed rates from Canadian origins to the south, composed of a proportional rate from the Canadian origins to the interchange points in the United States and a local rate to the south, *because* they are not published in tariff form as joint rates, even though the rail carriers operating within the United [fol. 317] States are participating in an established through route and participating in the through charges assessed for the single service represented by the through route, and are bound by the terms and conditions contained in the through bill of lading issued by the originating carrier at point of origin in Canada;

(7) Whether the district court erred in annulling and setting aside an order of the Commission requiring the rail carriers operating within the United States to cease and desist from the maintenance of unlawful rates which created an unduly preferential-prejudicial rate relationship between competing shippers,—in violation of Section 3 of the Interstate Commerce Act, 49 U.S.C., Section 3, *on the ground* that joint rates were assessed the preferred

shippers, *whereas* through rates based on combination of separate factors, one of which the district court held not subject to the jurisdiction of the Commission, under Section 1 of the Interstate Commerce Act, 49 U.S.C., Section 1, were assessed the prejudiced shippers;

(8) Whether the Interstate Commerce Commission has jurisdiction under Section 3 of the Interstate Commerce Act, 49 U.S.C., Section 3, to order the removal of the unlawful discriminations found in the through joint rates applicable on shipments originating in Canada and destined to points in official territory, which by complaint had been assailed as being unduly preferential to shippers in official territory and unduly prejudicial to shippers in southern territory, without regard to the method of rate publication employed by the rail carriers in providing rates for use by the shippers in southern territory which the Commission found to be unduly prejudiced by the level of rates maintained to official territory;

(9) Whether the Commission was authorized under Section 13(1) of the Interstate Commerce Act, 49 U.S.C., Sec- [fol. 318] tion 13(1), to hear the complaints, and had jurisdiction under Section 16(1) of the Interstate Commerce Act, 49 U.S.C., Section 16(1), to enter an order awarding damages, when it found that the assailed through transportation charges assessed by rail carriers on International shipments originating in Canada and terminating in southern territory were unjust and unreasonable and in violation of Section 1 of the Interstate Commerce Act, 49 U.S.C., Section 1, when it found that the rail carriers had failed to establish just and reasonable rates, for the service rendered, from the International Boundary, as required by Section 1(5) and 6(1) and (7) of the Interstate Commerce Act, 49 U.S.C., Sections 1(5) and 6(1) and (7), and *in lieu thereof* had established, maintained and participated in through routes over which unjust and unreasonable through rates and charges were assessed;

(10) Whether the district court erred in denying the Commission jurisdiction to grant relief to southern shippers as prayed in their complaints on the ground that the

Commission did not have jurisdiction over one of the factors constituting the through charge assessed the southern shippers even though their only interest is in the total through charges assessed them compared with those assessed their competitors in official territory.

E. B. Ussery, 608 Security Federal Building, Columbia, South Carolina, Attorney for Intervening Defendants.

[fol. 319] [File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 320]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL OF INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—Filed May 24, 1960

I.

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on March 7, 1960, and the order of the court entered March 26, 1960, denying defendants' motion for reconsideration.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the record made before the Commission filed with the district court, the exhibits submitted by defendants and received in evidence by the court July 9, 1959, and the following:

(a) Complaint filed March 12, 1959, by Central Vermont Railway, Inc., et al., plaintiffs, including the exhibits attached thereto;

[fol. 321] (b) Order of the court filed April 3, 1959, permitting withdrawal of certain parties' certificates;

(c) Order of the court filed April 8, 1959, designating three-judge statutory court;

(d) Answer of the defendants United States of America and the Interstate Commerce Commission to the complaint;

(e) Motion and notice of motion to intervene by H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(f) Answer of intervenors H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al., to the complaint;

(g) Order of the court filed May 23, 1959, permitting intervention of H. K. Porter Company, Inc.—Thermoid Division—successor in interest to Thermoid Company—Southern Division, et al.;

(h) Opinion of the court filed March 7, 1960;

(i) Motion by the United States of America and the Interstate Commerce Commission for reconsideration and to alter or amend the judgment;

(j) Letter dated March 15, 1960, by E. B. Ussery for intervening defendants, adopting motion for reconsideration by defendants United States of America and Interstate Commerce Commission;

(k) Order of the court filed March 26, 1960, denying motions for reconsideration;

(l) This notice of appeal.

[fol. 322] III.

The following questions are presented by this appeal:

Asbestos moves from origins in Canada to consignees in official territory on joint rates over Canadian and American rail carriers which meet at interchange points within the United States. Asbestos moves from the same Canadian origins and through the same interchange points to consignees in southern territory on combination rates at a higher level consisting of (1) a proportional rate established by the Canadian carriers from the Canadian origins to the interchange points in the United States and (2) separately established rates by the American carriers from such interchange points to the south. The questions involved are:

(1) Whether the District Court erred in holding that the Interstate Commerce Commission lacked power to determine the reasonableness and justness of the entire combination rate between the Canadian origins and points in the southern territory.

(2) Whether the District Court erred in failing to sustain the Commission's determination that the maintenance by railroads operating within the United States of joint rates to points in official territory, while maintaining combination rates on a higher level for like service from the same Canadian origins to points in the south, were unduly prejudicial to consignees in southern territory and unduly preferential of consignees in official territory, in violation of Section 3(1) of the Interstate Commerce Act.

Robert W. Ginnane, General Counsel, H. Neil Garson, Associate General Counsel, Attorneys for Interstate Commerce Commission.

[fol. 323] [File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 324]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL OF UNITED STATES TO THE SUPREME COURT OF THE UNITED STATES—Filed May 25, 1960

I

Notice is hereby given that the United States of America, one of the above named defendants, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on March 7, 1960, a timely motion for reconsideration of which judgment was denied on March 26, 1960.

This appeal is taken pursuant to 28 U.S.C. 1253.

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript (1) the parts of the record which the notice of appeal filed by the defendant Interstate Commerce Commission designated for inclusion in said transcript, and (2) this Notice of Appeal.

III

The following question is presented by this appeal:

[fol. 325] Whether the district court erred in failing to sustain the Commission's determination that the maintenance by railroads operating within the United States of

joint rates to points in Official Territory while maintaining combination rates on a higher level for like service from the same Canadian origins to points in Southern Territory, were unduly prejudicial to consignees in Southern Territory and unduly preferential of consignees in Official Territory, in violation of §3(1) of the Interstate Commerce Act.

Charles H. Weston, John H. D. Wigger, Attorneys for the United States of America, Department of Justice, Washington 25, D. C.

[fol. 326] [File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 333]

IN UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., et al., Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER EXTENDING TIME TO DOCKET APPEAL IN SUPREME COURT—June 14, 1960

Upon application of the intervening defendants, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, it appearing to the satisfaction of the Court that good cause has been shown for the enlargement of the time allowed for docketing this cause in the Supreme Court of the United States, it is hereby

Ordered, that the time for docketing this cause in the Supreme Court of the United States be extended from July 5, 1960 to July 23, 1960.

Dated at Brattleboro, this 14 day of June, 1960.

Ernest W. Gibson, United States District Judge.

[File endorsement omitted]

[fol. 334] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 335]

SUPREME COURT OF THE UNITED STATES

Nos. 257, 258 and 266—October Term, 1960

H. K. PORTER COMPANY, INC., et al., Appellants,

vs.

CENTRAL VERMONT RAILWAY, INC., et al.;

INTERSTATE COMMERCE COMMISSION, Appellant,

vs.

CENTRAL VERMONT RAILWAY, INC., et al.; and

UNITED STATES, Appellant,

vs.

CENTRAL VERMONT RAILWAY, INC., et al.

Appeals from the United States District Court for the District of Vermont.

ORDER NOTING PROBABLE JURISDICTION—October 17, 1960

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allowed for oral argument.

October 17, 1960

FILE COPY

No. 257

JUL 29 1960
JAMES R. BROWNING, Clerk

Supreme Court of the United States

OCTOBER TERM, 1960

H. K. PORTER COMPANY, INC., *ET AL.*, APPELLANTS,

versus

CENTRAL VERMONT RAILWAY, INC., *ET AL.*,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

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Supreme Court of the United States

OCTOBER TERM, 1960

No. .....

H. K. PORTER COMPANY, INC., *ET AL.*, APPELLANTS,

versus

CENTRAL VERMONT RAILWAY, INC., *ET AL.*,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

This appeal is filed on behalf of the H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company. These appellants will hereinafter be referred to as "Southern Consumers".

OPINION BELOW

The opinion of the United States District Court for the District of Vermont, dated March 7, 1960, 182 F. Supp. 516, is attached hereto as Appendix "A". The final judgment of the District Court, dated March 26, 1960, is attached hereto as Appendix "B". The Order of the District Court, dated June 14, 1960, extending the time for docketing in this Court from July 5, 1960, to July 23, 1960, is attached hereto as Appendix "C". The decisions of the Interstate Commerce Commission dated May 25, 1953, and May 7, 1958, reported respectively at 288 ICC 793 and 303 ICC 743, are attached hereto as Appendices "D" and "E". The Orders of the Commission of May 7, 1958, February 19, 1959, and March 11, 1959, are attached hereto as Appendices "F", "G" and "H", respectively.

JURISDICTION

This action was brought under 28 U. S. C. 1336 and 28 U. S. C. 2321 to 2325, to set aside and enjoin an order of the Interstate Commerce Commission. The decrees of the District Court were entered on March 7, 1960, and March 26, 1960. The "Southern Consumers" filed their notice of appeal in the District Court on May 5, 1960. The Interstate Commerce Commission filed its notice of appeal on May 24, 1960, and the United States of America filed its notice of appeal on May 25, 1960.

The jurisdiction of this court is conferred by 28 U. S. C. 1253 and 2101(b).

The following decisions sustain the jurisdiction of this court to review the judgment on direct appeal in this case: *Thompson v. United States*, 343 U. S. 549; *United States et al. v. Great Northern Railway Company*, 343 U. S. 562; *State of New York v. United States*, 331 U. S. 284; and *United States v. Pennsylvania Railroad Company*, 323 U. S. 612.

STATUTES INVOLVED

The pertinent portions of the statutes involved, 49 U. S. C. 1(a), (2), (4), and (5); 49 U. S. C. 2; 49 U. S. C. 3(1); 49 U. S. C. 6(1) and (7); 49 U. S. C. 8; 49 U. S. C. 13(1); and 49 U. S. C. 16(1), are set forth in Appendix I.

QUESTIONS PRESENTED

1. Whether the District Court erred in failing to sustain the Commission's determination that the maintenance by railroads operating within the United States of single factor joint rates applicable on asbestos and related commodities from points of Canadian origin in the province of Quebec to points in official territory, while maintaining through rates (made on a combination basis) on a higher level for like service from the same Canadian origins to points in the Carolinas were unduly prejudicial to consignees in the Carolinas and unduly preferential of consignees in official territory in violation of section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)).

2. Whether the District Court erred in holding that the Interstate Commerce Commission lacked power to determine the reasonableness and justness of through rates assessed on international shipments of asbestos and related commodities, moving over through routes on through bills of lading, from Canadian origins in the province of Quebec to points in southern territory in the Carolinas.

3. Whether the Commission was authorized under Section 13(1) of the Interstate Commerce Act (49 U. S. C. 13(1)) to hear the complaints, and had jurisdiction under Section 16(1) of the Interstate Commerce Act (49 U. S. C. 16(1)), to enter an order awarding damages when it found that the assailed through transportation charges assessed by rail carriers on international shipments originating in Canada and terminating in southern territory were unjust

and unreasonable and in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. 1), when it found that the rail carriers had failed to establish just and reasonable rates, for the service rendered, from the international boundary, as required by Section 1(5), 6(1), and (7) of the Interstate Commerce Act (49 U. S. C. 1(5), 6(1), and (7)), and **in lieu thereof** had established, maintained and participated in through routes over which unjust and unreasonable through rates and charges were assessed.

4. Whether the District Court erred in holding that the Commission did not have jurisdiction over proportional rates, filed with the Commission by the Canadian carriers, applying on asbestos and related commodities from Canadian origins in the province of Quebec to East Alburgh and Newport, Vermont, duly restricted to apply only on shipments moving to destinations in the United States for use by receivers of asbestos and related commodities in constructing through transportation charges to points in the United States where no through single factor joint rates were published in the same tariff.

STATEMENT

The proceedings before the Commission, which are under review in this action, were initiated by the "Southern Consumers", appellants herein, by complaints duly filed with the Interstate Commerce Commission. The "Southern Consumers" are manufacturers of asbestos textile products and other products such as asbestos shingles. In the sale and marketing of these products throughout the United States these "Southern Consumers" are in competition with similar manufacturers of asbestos textile products and other products such as asbestos shingles who are located in what is known as official territory. Official territory may be roughly defined as that part of the United States east of the Mississippi River, north of the Ohio River and the Vir-

ginia cites such as Roanoke, Lynchburg, Richmond, and Norfolk. "The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there." 303 ICC at page 747 (Appendix "E", p. E-7).

The basic major raw materials utilized in the manufacture of asbestos textile products and asbestos shingles are crude asbestos, asbestos fiber generally, asbestos waste, and asbestos refuse and shorts. The asbestos products named are strategic materials and are obtained by manufacturers of asbestos textile products and asbestos shingles both in the Carolinas and in official territory from asbestos producing mines located in Canada in the province of Quebec. Since the turn of the century, manufacturers located in official territory have been assessed through transportation charges from the Canadian mines based on single factor joint rates filed with the Interstate Commerce Commission in due tariff form in accordance with section 6 of the Interstate Commerce Act (49 U. S. C. 6). "Southern Consumers" have always been assessed through transportation charges constructed out of existing proportional rates from the Canadian mines to East Alburgh and Newport, Vermont, and local rates of the appellees from East Alburgh and Newport, Vermont, to the Carolina destinations at which appellants' plants are located.[1]

The proportional rates from the Canadian mines to East Alburgh and Newport, Vermont, are published in the same tariff on file with the Interstate Commerce Commission which carries the single factor joint rates from the Canadian mines to points in official territory. These proportional rates are restricted in the tariff so as not to apply

[1] The through transportation charges on asbestos waste from Canadian National Railway Company mines to Davidson, North Carolina, are determined by use of factors to and from Baltimore, Maryland.

to any intermediate point in Canada and labeled with a reference mark the explanation of which reads as follows: "Proportional rate, applicable only on shipments destined to points in the United States".

The proportional rates to East Alburgh and Newport, Vermont, are published by the Canadian National Railway Company for application from mines on its line in the province of Quebec. The line of the Canadian National Railway Company extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Incorporated. The proportional rates to Newport are published by the Quebec Central Railway Company for application from mines on its line in the province of Quebec. The Quebec Central Railway Company extends across the international boundary about five miles to Newport, Vermont, where it connects with the Canadian Pacific Railway Company.[2]

The through transportation charges assessed the "Southern Consumers" are determined by use of the proportional rates just described and local rates from East Alburgh and Newport, Vermont, to the respective destinations in the Carolinas. These local rates are class rates excepting rates applicable on asbestos fiber from East Alburgh and Newport, Vermont, to Charlotte, Davidson, and Marshville, North Carolina, which are commodity rates. These local rates, except as noted, are the class 35 rates prescribed by the Interstate Commerce Commission in Docket No. 28300—*Class Rate Investigation*, 1939, 281 ICC 213. The commodity rates had their inception in the publication in 1936 of the then applicable class A or eighth class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-

[2] The Quebec Central is a subsidiary of the Canadian Pacific. See *Canadian Pacific Railway Company Lease*, 105 ICC 575, 576.

rate routing. Due to lesser general increases authorized by the Commission on commodity rates than on class rates, and the readjustment of the class rates by order of the Commission in Docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates from East Alburgh and Newport, Vermont, to Charlotte, Davidson, and Marshville, North Carolina, over all authorized tariff routes, 303 ICC at page 747 (Appendix "E", pp. E-6 and E-7).

These international shipments of asbestos and other asbestos products from mines in the province of Quebec to destinations in the Carolinas and in official territory move over through tariff routes and under through bills of lading which were and are issued either by the Quebec Central Railway Company or the Canadian National Railway Company, as originating carriers. The through transportation charges were generally prepaid at origin by the consignors and billed separately to the "Southern Consumers". The Commission found that these through transportation charges had been borne in full by the "Southern Consumers". 303 ICC at page 747 (Appendix "E", p. E-7).

"Southern Consumers" by duly filed complaints with the Interstate Commerce Commission alleged that the single factor joint rates maintained by the appellees from the Canadian mine origins to destinations in official territory were unduly prejudicial to "Southern Consumers" in southern territory and unduly preferential of consignees in official territory, in violation of Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)). They also alleged that the through transportation charges assessed them were unduly prejudicial to them and unduly preferential of consumers of asbestos and other asbestos products in official territory, in violation of Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)).

The "Southern Consumers" also alleged in the complaints that the through transportation charges assessed them on the international shipments of asbestos and other asbestos products from mines in the province of Quebec to destinations in the Carolinas at which their plants are located were unjust and unreasonable, in violation of section 1 of the Interstate Commerce Act (49 U. S. C. 1) and prayed damages in the form of reparation as authorized by the Interstate Commerce Act (49 U. S. C.).

After hearings before an Examiner, receipt of original briefs, rendition of the Examiner's proposed report and recommended order, and oral argument, the Interstate Commerce Commission rendered its decision dated May 7, 1958—Appendix "E" attached hereto. The Commission's ultimate findings of fact, supported by various and sundry basic findings of fact, were to the effect that "Southern Consumers" had been and were being assessed unjust and unreasonable transportation charges and directed the complainants before it to comply with Rule 1.100 of the General Rules of Practice which relates to awards of reparation; and that "Southern Consumers'" competitors in official territory were being unduly preferred to the undue prejudice and disadvantage of the complainants in the Carolinas; and that the transportation charges assessed the "Southern Consumers" in the Carolinas were unduly prejudicial to them and unduly preferential of their competitors in official territory.

The unlawful discrimination was ordered removed. See Appendix "F" attached hereto.

Thereafter on or about June 13, 1958, the appellees filed a petition with the Interstate Commerce Commission praying for the reopening of the proceedings for oral argument before and reconsideration by the Commission. This petition was denied by order dated December 10, 1958. On or about February 20, 1959, the appellees filed a second

petition with the Interstate Commerce Commission seeking reopening of the proceedings for reconsideration and for vacation of the outstanding orders entered therein. This second petition of appellees was denied on March 11, 1959. In the order of denial the Commission clarified its finding in the decision of May 7, 1958, and accompanying order, that the rates from Quebec Central Railway Company mines to points in official territory which "appear to represent reasonable maxima" related only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act (49 U. S. C. 1) and to the award of reparation. See Appendix "H" attached hereto.

On March 12, 1959, the appellees instituted action in the United States District Court, District of Vermont, to enjoin and annul the orders of the Interstate Commerce Commission entered pursuant to its decision of May 7, 1958. The District Court entered its decision March 7, 1960 (Appendix "A" attached hereto), and annulled and set aside the orders of the Commission entered May 7, 1958, and February 19, 1959 (Appendices "F" and "G", respectively, attached hereto).

The order of the District Court denying motions for reconsiderations, dated March 26, 1960, is attached hereto as Appendix "B".

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

Appellee, Canadian National Railway Company, defended before the Commission on the ground that it participated only in the proportional rates to East Alburgh, Vermont; and thus was not subject to the Commission's jurisdiction and prayed the complaints, as to it, be dismissed. The remaining defendants before the Commission contended that only the rate factors southbound from New-

port and East Alburgh were subject to the Commission's jurisdiction. They urged that since the complaints assailed the through transportation charges, the complaints should be dismissed. 303 ICC at page 752 (Appendix "E", p. E-13).

The Commission carefully considered these contentions and held that it had jurisdiction to entertain the complaints. The Commission stated that rail carriers within the United States, subject to its jurisdiction, have an alternative with respect to participation in the handling of international traffic. The first alternative presented is that such carriers may publish rates to or from the international boundary, and if such are published, the carriers are answerable only for those rates, or, such carriers may, as a second alternative, participate in international rates and become jointly and severally liable for any unlawfulness found to exist therein. 303 ICC at page 752 (Appendix "E", p. E-13).

Jurisdiction is not a concept governed by practical consideration but is absolute. Following this concept, the Commission examined the evidence and held that the appellees, defendants before the Commission, had not established and published rates to and from the international boundary line but instead had participated in through international rates. At page 753 of 303 ICC (Appendix "E", pp. E-13 and E-14), the Commission stated that had the railroads intended the local rates from Newport and East Alburgh to apply from the international boundary, such rates should have been so published in clear and unequivocal terms. The Commission in its decision of May 7, 1958, 303 ICC at pages 753 and 754 (Appendix "E", pp. E-14 and E-15), cited certain of its decisions which made plain that it had jurisdiction over the rates and charges assessed by carriers operating in the United States from the international boundary line, and had exercised that jurisdiction. In *Newsprint Paper to Detroit*, 161 ICC 637, the Commission exercised jurisdiction because the carriers operating in the

United States had failed to publish rates from the middle of the Detroit River, which is the international boundary line, to Detroit. The Commission also cited other decisions wherein it had exercised jurisdiction to and from the international boundary line as to matters not concerned with rates.

II

The Commission dealt with the argument advanced by the railroads that it was not practical or feasible to interchange traffic at the international boundary line north of Newport and East Alburgh, Vermont, and held that it did "not see how this would affect the situation", and held that it had jurisdiction over the rail carriers to the extent of their operation within the United States regardless of the manner of rate publication. 303 ICC at page 754 (Appendix "E", p. E-15).

The District Court in its decision of March 7, 1960, Appendix "A" attached hereto, annulled and set aside the section 3 orders issued by the Commission under dates of May 7, 1958, and February 19, 1959, Appendices "F" and "G" respectively and attached hereto. This action of the District Court was based on its holding "that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate" (Appendix "A", pp. A-11 and A-12).

It will be noted that the District Court was of the opinion that the point of interchange of the traffic determined the jurisdiction of the Commission. The finding of the Commission that it had jurisdiction regardless of point of interchange was ignored.

III

The District Court erred in holding that the Commission did not have jurisdiction to determine the issues presented to the Commission for decision. The issues presented for decision involved alleged violations of Section 3 of the Interstate Commerce Act (49 U. S. C. 3), and Section 1 of the Interstate Commerce Act (49 U. S. C. 1) insofar as that Section is involved in determining the amount of damages which should be awarded under Section 16(1) of the Interstate Commerce Act (49 U. S. C. 16(1)). The issues involved through transportation charges assessed the "Southern Consumers" versus the through transportation charges assessed their competitors in official territory. It is conceded by all parties in interest that the through transportation charges assessed the competitors in official territory are based on through single factor joint rates, and that the "Southern Consumers" in their complaints before the Commission assailed the through transportation charges assessed them, and these charges were constructed out of factors applying to and from points in the United States south of the international boundary line. "Southern Consumers" complained of each through rate as a unit. They did not complain merely of the aggregate of the individual proportional and through rates customarily charged, by the defendants before the Commission, for transportation service rendered by the respective lines included in the through routes. They complained of the single charge which was assessed for the transportation service from the point of origin in Canada to the point of destination in the Carolinas.

The District Court concedes that the Commission had jurisdiction to determine the lawfulness of any international rates which are published in the form of single factor joint rates. (Appendix "A" at p. A-5). Jurisdiction of the Commission in such an instance was firmly fixed by this

Court in *News Syndicate Co. v. N. Y. Central R. Co.*, 275 U. S. 217.

The through rates assailed by the "Southern Consumers" are in fact joint through rates. The fact that these joint through rates were constructed out of existing proportional rates from the Canadian mine origins to East Alburgh and Newport, Vermont, and local rates from those points to the Carolina destinations is not of legal significance. A proportional rate, as the term implies, is simply a part of or a remainder of a through rate. *Hocking Valley Ry. Co. v. Lackawanna Coal & Lbr. Co.*, 224 Fed. 930; *Becker v. Pere Marquette R. Co.*, 28 ICC 645; *Swift & Co. v. Erie R. Co.*, 45 ICC 554. A proportional rate is of the nature of a division of a joint through rate. The amount of compensation the different carriers receive for the service rendered in connection with the through rate is of no concern whatsoever to the "Southern Consumers". Their only interest is that the through transportation charge be reasonable as a whole, and free of undue discrimination in any form or manner. If the through transportation charges assessed by the participating carriers are unreasonable or otherwise unlawful, they are jointly and severally responsible for the unlawfulness. *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217.

It is immaterial in the instant case that international shipments are involved rather than domestic shipments moving entirely within the confines of the United States. This fact was made plain by this Court in *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458. In the *Sullivan case* the complainant before the Commission challenged the lawfulness of the American factor of a through international rate and did not attack either the Canadian factor or the through transportation charges resulting from the addition of the two factors. The Commission found that the assailed American factor was unreasonable and awarded reparation. This

Court held that such could not be because under the circumstances of the case it had to **assume** that the through transportation charge was reasonable. This Court reiterated that the shippers' only interest is that the through ate be reasonable as a whole and cited in support thereof the *Sloss-Sheffield case.* The through rates involved in the *Sloss-Sheffield case* and the *Sullivan case* were in fact joint through rates even though they were constructed on a so-called combination basis.

Further—it is clear that there is no legal distinction between a through rate published as a single factor joint rate and a through rate applicable over a through route. The District Court and the appellees err when they contend that an arrangement between participating carriers **only exist** when the joint rate is published in single factor form. This Court in *Thompson v. United States,* 343 U. S. 549, made it plain that a "through route" is an arrangement, express or implied, between participating carriers for the continuous carriage of goods from the origin point to the destination point; and that this through carriage implies a "through rate" which may be an aggregate of the separate rates fixed independently by the separate carriers forming the through route. This Court in so holding cited *Through Routes and Through Rates,* 12 ICC 163, 166, decided by the Interstate Commerce Commission in 1907. In that case the Commission pointed out that Section 6 of the Act (49 U. S. C. 6) contemplated different forms of tariff publication in the establishment of through rates.

IV

In the instant case the "Southern Consumers" assailed the through transportation charges assessed their competitors in official territory as being unlawful under Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)) and the Commission found that unlawful discrimination

existed. The "Southern Consumers" also alleged that the through transportation charges assessed them were likewise unlawful under Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)) and the Commission found unlawful discrimination existed. It entered a cease and desist order, Appendix "F" attached hereto, requiring the removal of the unlawfulness.

The District Court is in error when it held the assailed through transportation charges from the Canadian mines to "Southern Consumers'" plants in the Carolinas are divisible and considered separately the individual factors out of which the through transportation charges were constructed. The District Court, by its holding, makes it impossible for the Commission to determine the lawfulness under Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)) of the rate adjustment which had been complained of as being unduly discriminatory. Due to the method of tariff publication the Commission could not possibly compare charges assessed "Southern Consumers" with those assessed their competitors in official territory for the transportation service rendered from the interchange points in Vermont. Single factor joint rates were assessed their competitors in official territory. The defendants before the Commission did not reveal the charges assessed the official territory competitors from the interchange points to destinations in official territory. If such a charge existed in tariff form, it was the duty of the defendant railroads to reveal the charges to the Commission. *Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co.*, 283 U. S. 654.

The District Court's holding that the proportional rates from the Canadian mines to East Alburgh and Newport, Vermont, was not subject to the Commission's jurisdiction under Section 1(a) and (2) of the Interstate Commerce Act (49 U. S. C. 1(a) and (2)) was the basis for annulling the

orders of the Commission which had been entered under Section 3(1) of the Act (49 U. S. C. 3(1)). The jurisdiction of the Commission under Section 3(1) of the Act (49 U. S. C. 3(1)) does not depend upon its jurisdiction under Section 1(a) and (2) of the Act (49 U. S. C. 1(a) and (2)). *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342. In the *cited case* this Court held that Congress had delegated all its inherent powers to the Interstate Commerce Commission to enable that Commission to prohibit railroads rendering a transportation service within the confines of the United States from engaging in unlawful discrimination and practices—such as granting selected shippers undue preferred treatment to the undue prejudice of other shippers. In the instant case the Commission found that the single factor through joint rates on asbestos and related commodities from the Canadian mines to destinations in official territory unduly prefers receivers of asbestos in that territory and unduly prejudices "Southern Consumers" in the Carolinas. Under this finding the Commission had authority under Section 3(1) of the Act (49 U. S. C. 3(1)) to prohibit the continuation of the unlawful discrimination even though asbestos had never actually moved from Canadian mines to destinations in the Carolinas due to lack of rates or routes. *State of New York v. United States*, 331 U. S. 284.

The Commission also found that the through rates assessed "Southern Consumers" were unduly prejudicial to them and unduly preferential of their competitors in official territory. Undue prejudice may be inflicted as effectively by a through rate which is a combination rate as by a joint through rate. In *United States v. Illinois Cent. R. Co.*, 263 U. S. 515, at page 527, this Court said:

> A through route was established; and the transportation is performed as the result of this arrange-

ment between the carriers, express or implied.[3] Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

The questions presented by this appeal are substantial and of public importance, for should the decision of the District Court be permitted to stand, "Southern Consumers" of asbestos would be at the mercy of appellee railroads. By the simple selection of method of tariff publication the appellees could destroy any business enterprise in the United States which depended on raw materials produced in an adjacent foreign country. The appellees could engage in unlawful discrimination at will. This could be accomplished through manipulation as to method of tariff publication and it is respectfully suggested that **no such possibility** was contemplated by the Congress when it enacted Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)).

In *Interstate Commerce Commission v. B. & O. R. R.*, 225 U. S. 326, this Court said:

> Tariffs are but forms of words, and the Interstate Commerce Commission, in the exercise of its power to administer the Act to Regulate Commerce, can look beyond the forms to what caused them and what they are intended to, and do, cause.

V

The Commission did not enter an order specifying the amount of damages sustained by the appellant shippers. The Commission merely instructed the shippers to comply with Rule 1.100 of the General Rules of Practice. The issue before the District Court which related to the Commission's finding under Section 1 of the Interstate Commerce

[3] See *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139, note 2.

Act (49 U. S. C. 1) was whether the Commission had authority to determine the reasonableness of the through transportation charges assessed the "Southern Consumers" in connection with the Commission's finding that the "Southern Consumers" were entitled to an award of reparation. Appellants were aware of the fact that the validity of an order of the Commission requiring the payment of reparations cannot be challenged before a three-judge statutory court under 28 U. S. C. 2321. The appellees challenged the authority of the Commission to find that the assailed through transportation charges assessed "Southern Consumers" were unreasonable in the past and in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. 1). The District Court's finding that the Commission lacked jurisdiction over the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont, automatically rendered void the Commission's finding that the through transportation charges assessed the "Southern Consumers" were unreasonable in the past.

The Commission found that the defendant railroads, appellees here, had failed to establish rates from the international boundary line to Carolina destinations as required by the Act. 303 ICC at page 752 (Appendix "E", p. E-13). It was the duty of the defendant railroads, appellees here, under Sections 1(5), 6(1), and (7) of the Act (49 U. S. C. 1(5), 6(1), and (7)) to establish lawful rates from the international boundary line which reflected the transportation service rendered. Appellees' failure to do so made them under Section 8 of the Act (49 U. S. C. 8) liable for damages sustained. The Commission had authority to hear the complaints under Section 13(1) of the Act (49 U. S. C. 13(1)) and under Section 16(1) of the Act (49 U. S. C. 16(1)) had jurisdiction to award damages for the violation. Obviously the Commission had jurisdiction to determine the reasonableness of the through transportation charges

assessed. *News Syndicate Co. v. N. Y. Central R. Co., supra.*

Aside from the finding of the Commission that the appellees had failed to establish rates from the international boundary line, it is clear that such a failure exists for the factors assessed "Southern Consumers" south of East Alburgh and Newport were local rates, containing two terminal charges. Hereinbefore it has been shown that the factors of the through joint rates from East Alburgh and Newport, Vermont, to destinations in the Carolinas are local class rates or had their inception in local class rates. For the most part these applicable class rates were prescribed by the Commission in *Class Rate Investigation, 1939, supra.* These rates were designed and prescribed by the Commission to apply on local traffic and reference to the Commission's decision will show conclusively that such local rates contain two terminals—one at point of origination and the other at point of destination. The mere fact that the only legally applicable rates on asbestos and related products from East Alburgh and Newport, Vermont, to the Carolina destinations are class rates is positive proof that the appellee railroads have not complied with the statutory duty imposed upon them. Local rates are only applicable on through traffic in the absence of a more specific rate or basis of rates thereon. *Indian Refining Co., Inc. v. Louisville & N. R. Co.*, 155 ICC 380. The appellees have not complied with the Act and established rates from the international boundary line to the Carolina destinations which reflect the transportation service rendered in connection with these international shipments which moved over through routes, under through bills of lading, and interchanged at East Alburgh and Newport, Vermont, with the Canadian National Railway Company and the Quebec Central Railway Company, respectively. *Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co., supra.*

Such would be true even though we were to consider East Alburgh and Newport, Vermont, as being points on the international boundary line. The Commission, however, found at page 752 of its May 7, 1958, decision, 303 ICC (Appendix "E", p. E-13), that such points were not on the international boundary line, and in fact, the proportional rates heretofore described, maintained by the Canadian National Railway Company and the Quebec Central Railway Company to East Alburgh and Newport, Vermont, respectively, obligated those carriers to provide substantial transportation service within the United States. The Commission found that the Act makes no distinction between domestic and foreign carriers in this respect, and that all common carriers by railroad are subject to the jurisdiction of the Commission to the extent that transportation takes place within the United States. 303 ICC at page 753 (Appendix "E", p. E-14). If these findings are to stand, and they have not been challenged, then it is perfectly clear that the appellees have failed in their statutory duty to provide rates from the international boundary line to Carolina destinations which reflect the transportation service rendered. As stated, the Commission rejected the appellees' contention that they had in fact published rates from the international boundary to the Carolina destinations and held that the appellees had and were participating in international rates and as a result thereof were jointly and severally liable for any unlawfulness in such rates.

The finding of the Commission that the through transportation charges assessed "Southern Consumers" were unlawful should not be disturbed. The District Court stated that the appellees did not argue that the Commission's findings were without substantial evidentiary basis if the rates under review were to be viewed as an indivisible entity (Appendix "A", p. A-4). It is clear that it is the through transportation charges which must be considered and not

individual factors out of which such through transportation charges are constructed. "Southern Consumers" having been damaged, and the Commission having so found, they are entitled to reparation, the exact amount thereof to be determined at a later date.

It is respectfully submitted that the District Court's finding that the Commission lacked authority to determine the reasonableness of international rates for the purpose of awarding damages is of substantial and public importance.

VI

The District Court erred when it held that the proportional rates applicable from the Canadian mines to East Alburgh and Newport were not subject to the jurisdiction of the Commission.

These proportional rates were, and are, published and maintained in the same tariff which is on file with the Commission, as required by Section 6 of the Act (49 U. S. C. 6), and in which single factor joint rates are maintained to destinations in official territory. The proportionals are restricted so as not to apply to any intermediate point in Canada **but only on traffic destined to points in the United States.** Due to the method of tariff publication of through rates from Canadian mine origins to destinations in southern territory, the appellees used these proportional rates in constructing the through transportation charges assessed the "Southern Consumers". The proportionals were, and are, maintained in a published tariff which has the effect of a statute and is binding alike on the carriers and the "Southern Consumers". *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184; *Davis v. Portland Seed Company*, 264 U. S. 403.

At page 752 of 303 ICC (Appendix "E", pp. E-13 and E-14) the Commission found that these proportional rates,

so published, obligated the Canadian lines to provide a substantial transportation service within the United States.

At page 754 of 303 ICC (Appendix "E", p. E-15) the Commission also found that the appellees' argument that it would not be practical or feasible to interchange traffic at the exact international boundary line did not affect the situation. It held that the jurisdiction of the Commission over the rail carriers applied to the extent that the carriers operated within the United States regardless of the manner of rate publication.

The appellees have not filed with the Commission rates applicable from the international boundary line to East Alburgh or Newport, Vermont. If they had published such rates, it was the duty of the appellees to so inform the Commission and say where such rates could be found. *Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co., supra.*

The Commission's finding that these proportional rates were subject to its jurisdiction is not a unique finding. In *Newsprint Paper to Detroit, supra*, the Commission held that rail carriers' failure to publish rates from the international boundary line, which was in the middle of the Detroit River, to Detroit was in violation of Section 6 of the Act (49 U. S. C. 6), and as a result the Commission had jurisdiction over the rate from the Canadian origin to Detroit. There as here a rate was published from a Canadian origin to a point in the United States and no separate and distinct rate was published from the international boundary line to the same point in the United States.

It is clear that interchange of traffic is a subject matter which deals with physical operation in the handling of traffic, whereas, publication of rates is a matter strictly subject to Section 6 of the Interstate Commerce Act (49 U. S. C. 6).

It is respectfully suggested that the District Court's holding that these proportional rates are not subject to

the jurisdiction of the Interstate Commerce Commission raises a question which is substantial and of public importance.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

E. B. USSERY,
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Columbia 1, South Carolina,
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Of Counsel:
JOHN D. CARBINE,
Mead Building,
Rutland, Vermont,
July 21, 1960.

CERTIFICATE OF SERVICE

I, E. B. Ussery, one of the attorneys for the H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Jurisdictional Statement on the several parties to this action, as follows:

1. On the appellees, Central Vermont Railway, Inc., *et al.*, by mailing copies in duly addressed envelopes to its attorneys of record, with air mail postage prepaid, Horace H. Powers, Esq., Railroad Terminal Building, St. Albans, Vermont, J. Edgar McDonald, Esq., 466 Lexington Avenue, New York 17, N. Y., and John F. Reilly, Esq., 750 Third

Avenue, New York 17, N. Y.; J. Raymond Hoover, Esq., Metropolitan Bank Building, Washington 5, D. C., William H. Parsons, Esq., Colorado Building, Washington 5, D. C.

2. On the United States of America, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record Honorable J. Lee Rankin, Solicitor General, and to Honorable Robert A. Bicks, Acting Assistant Attorney General, John H. D. Wigger, Esq., Attorney, United States Department of Justice, Washington 25, D. C., and Louis G. Whitcomb, Esq., United States Attorney for Vermont, Rutland, Vermont.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and to H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

This 21st day of July, 1960.

E. B. USSERY,
608 Security Federal Building,
Columbia 1, S. C.

Appendix A

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., Et Al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

Argued July 9, 1959
Finally submitted on briefs, November 1, 1959
Decided March 7, 1960

Before:

WATERMAN, *Circuit Judge*,
FOLEY and GIBSON, *District Judges*.

Horace H. Powers, St. Albans, Vermont; (J. Raymond Hoover, Washington, D. C.: J. Edgar McDonald, New York City; William H. Parsons, Washington, D. C.: John F. Reilly, New York City, of counsel) *for Plaintiffs*.

Robert W. Ginnane, General Counsel; H. Neil Garson, Assoc. General Counsel, *for Interstate Commerce Commission*.

Robert A. Bicks, Acting Asst. Atty. General; John H. D. Wigger, Attorney, Department of Justice, Washington, D. C.; Louis G. Whitcomb, U. S. Attorney for Vermont, Rutland, Vermont, *for United States of America*.

John D. Carbine, Rutland, Vermont; E. B. Ussery, Columbia, South Carolina (Harvey L. Golden, Joseph J. Lipton, Columbia, South Carolina, of counsel) *for Interveners*.

WATERMAN, *Circuit Judge*:

Ninety-one railroads [1] join in this action to enjoin and annul certain orders of the Interstate Commerce Commission,[2] entered pursuant to a decision of the full Commission reported at 303 ICC 743 (May 7, 1958). A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?

The rates in question pertain to the carriers of asbestos, a transportation originating in the Province of Quebec, Canada, and terminating at various points in North and South Carolina. The principal source of asbestos for United States manufacturers of asbestos products is a narrow belt of land in southern Quebec extending northeast and southwest approximately fifty miles west of the Maine border. Railroad appears to be the principal method of transporting this asbestos to its American users. The asbestos area of southern Quebec is served by two Canadian railroads, the Canadian National and the Quebec Central. Asbestos intended for consignees in the southern-Atlantic states is carried by the Canadian lines to East Alburg, Vermont, and Newport, Vermont (points respectively 3 and 5 miles south of the international boundary) where the cars are turned over to American railroads in an "interchange" operation. Customs inspection on incoming railroad freight occurs at East Alburg and at Newport; and, to that extent at least, these towns may be regarded as border points.

The Canadian carriers have joined with American carriers in the publication of joint rates for the carriage of asbestos to points in the middle-Atlantic states and the middle-west. However, for the carriage of asbestos to the

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[1] Originally ninety-eight railroads joined as plaintiffs. However, on April 6, 1959, Judge Gibson issued an order permitting seven southern railroads to withdraw.

[2] Two orders are attacked. They are an Order dated May 7, 1958 that required the railroads to cease and desist from exacting rates held to be unreasonable and prejudicial in the Commission's decision of the same date; and an Order dated February 19, 1959, that amended the effective date of the May 7, 1958, Order.

southern-Atlantic states the carriers concerned have not published joint rates but instead have published combination rates.[3] One factor of these combination rates is a proportional rate[4] pertaining to the transportation from the mines in Quebec to the Vermont points of interchange. The other factor is a local rate pertaining to the transportation from these points of interchange to the various southern destinations.

In 1951 Thermoid Company, Southern Division, a manufacturer of asbestos textile products, located in Charlotte, North Carolina, filed with the Commission a complaint alleging that the combination rates for the carriage of asbestos from mines located along the lines of the Quebec Central to Charlotte were unreasonable and were prejudicial in comparison with the joint rates given complainant's competitors in the middle-Atlantic states and the middle-west. As the complaint wound its way upward through the various levels of Commission adjudication, four additional complaints of a similar nature were consolidated with it.[5] In its decision the Commission accepted complainants' contentions. It held that the Quebec-Carolina rates were unreasonable and prejudicial and ordered reparation to the extent that the rates exceeded the rates for comparable distances charged complainants' competitors in the middle-Atlantic states and the middle-west.

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[3] In railroad parlance a *joint* rate on a through route differs from *a combination* rate on a through route in that a joint rate is reached through an agreement of the participating carriers and each participating carrier is jointly and severally liable for the entire rate. See *Louisville and N. R. R. v. Sloss-Sheffield Co.*, 269 U. S. 217 (1925) at pp. 231-234.

[4] A *proportional* rate covers a portion of a through route and differs from a *local* rate between the same points in that the proportional rate applies only to transportation on the through route. See *Lewis-Simas-Jones Co. v. Southern Pacific R. Co.*, 283 U. S. 654, 663 (1931). Apparently the rates south of East Alburg and Newport to the Carolinas are merely local rates.

[5] The net effect of the consolidation was to increase the number of complainants to four so that the group then included manufacturers of asbestos products in Charlotte, Davidson and Marshville, North Carolina, and North Charleston, South Carolina and to expand the complaint so as to bring into question the rates from the mines along the Canadian National as well as those from the mines along the Quebec Central.

The four complainants in the proceedings before the Commission have intervened in this action under 28 U. S. C. §2323.

We are, of course, without authority to consider the validity of the Commission's orders allowing reparations;[6] and plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if those rates are to be viewed as an indivisible entity. Plaintiffs' argument before this court is confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border i. erchange in Vermont southward to the Carolinas.

The Commission's power with respect to transportation wholly by railroad is set forth in Sections 1(1)(a) and 1(2) of the Interstate Commerce Act, 49 U.S.C. §§1(1)(a). and 1(2). These sections in pertinent part read as follows:

"Carriers subject to regulation

"(1) The provisions of this chapter shall apply to common carriers engaged in—

"(a) The transportation of passengers or property wholly by railroad, ...

. . . "from or to any place in the United States to or from a foreign country, *but only insofar as such transportation* or transmission *takes place within the United States.*"

"Transportation subject to regulation

"(2) The provisions of this chapter shall also apply to such transportation of passengers and property . . . *but only insofar as such transportation or* transmission *takes place within the United States* . . . (Italics supplied).

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[6] Under 28 U. S. C. §2321 the jurisdiction of a three-judge district court extends to all orders of the Commission save those ". . . for the payment of money or the collection of fines, penalties and forfeitures . . . ." Under 49 U. S. C. §16(a) an action for the enforcement of a reparations order is to be brought by the complainant in one of several district courts or in a state court. In *United States v. ICC*, 337 U. S. 426 (1949) the Supreme Court indicated that the activities of a three-judge district court were to be carefully confined to those expressly provided for by Congress.

As the Commission emphasized in its decision in the present case, it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into joint rates for international transportation. See *Lewis-Simas-Jones Co. v. Southern Pac. R. Co.*, 283 U. S. 654, 660 (1931); *Fruit Importers v. Atlantic Coast Line R. Co.*, 188 I. C. C. 520, 523 (1932); *International Nickel Co. v. Director General*, 66 I. C. C. 627 (1922). However, it is equally well settled that the Commission does have power to pass upon the legality of existing joint rates on international transportation; and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation "only insofar as such transportation . . . takes place within the United States." [7] See

[7] Prior to February 28, 1920 Section 1(1) declared the Act to be applicable to carriers engaged in any of four types of international transportation: (1) from the United States to an adjacent foreign country; (2) from the United States through a foreign country to the United States; (3) from the United States to a foreign country when shipment is being carried from an originating point in the United States to a port of transshipment; (4) from a foreign country to the United States when the shipment is being carried to a terminating point in the United States from a port of entry either in the United States or in an adjacent foreign country. In *Galveston, H. & S. A. R. Co. v. Woodbury*, 254 U. S. 357 (1920), a case decided under Section 1(1) as it existed prior to the 1920 Amendments, the Supreme Court held that transportation *from* an adjacent foreign country to the United States was within the Commission's jurisdiction under the provisions relating to the transportation from the United States to an adjacent foreign country. On February 28, 1920, (Section 400 of the Transportation Act of 1920, 41 Stat. 474) Section 1(1) was amended to apply to transportation: (1) from the United States through a foreign country to the United States, and (2) from or to the United States to or from

Black Horse Tobacco Co. v. Illinois Central R. Co., 17 ICC 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co. v. Director General*, 66 ICC 627 (1922). The Supreme Court has upheld the Commission's interpretation in two cases, *News Syndicate Co. v. New York Cent. R. Co.*, 275 U. S. 178 (1927) and *Lewis-Simas-Jones Co. v. Southern Pac. R. Co.*, 283 U. S. 654 (1931).

The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. The Canadian carriers published proportional rates to East Alburg, Vermont, and Newport, Vermont, the interchange points; and the American carriers published local rates for the remainder of the transportation. The Commission does not dispute plaintiffs' statement that there are no facilities for interchange available between the international boundary and East Alburg and Newport. Nor does the Commission dispute that, as to shipments under the assailed combination rates, the Canadian carriers operate within the United States only for the purpose of turning over the asbestos to American carriers.[9] In its decision the Commission made no findings that the local rates south of the interchange points were unreasonable or prejudicial. The Commission, nevertheless,

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a foreign country; but only insofar as these two types of international transportation take place within the United States. Section 1(2) quoted in the opinion, was a new section added by the 1920 Act.

[8] There is language in *News Syndicate*, *supra*, at 186-87, and *Lewis Simas-Jones*, *supra*, at 663, which might be construed as indicating that the Commission would be without jurisdiction over the joint rate if the American carrier had also published a rate for the American portion of the transportation. The Commission, however, has subsequently held that it has jurisdiction over joint rates irrespective of whatever additional rates may be filed. *Carstens Packing Co. v. Great Northern R. Co.*, 264 ICC 164 (1945); see also Cyanamid and Cyanide from Niagara Falls, Ont., 155 I. C. C. 488 (1929); Publication of Rates between United States and Canada, 147 ICC 778 (1928).

[9] Because the Canadian rate is a proportional rate, it does not apply to any shipments to American consignees at points between the international boundary line and the interchange points, nor does it apply to shipments to be delivered by Canadian carriers to consignees located at the interchange points.

held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred within the United States.[10] The Commission stated its position in the following words:

> "The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. [The Commission's reference is to publication of rates to and from the international boundary] The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to those points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States."

First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada.[11] It is now settled that the Commission need not make this distinction if the inter-

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[10] As to those shipments where the interchange occurred at St. Johns, Quebec, the Commission held that the Canadian carrier was not liable for reparation. Apparently, however, the American carriers were liable for reparation even as to these shipments.

[11] In its decision in the present case the Commission states, at p. 754, that its jurisdiction here exists "regardless of the manner of rate publication." We gather this to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

national transportation is conducted on the basis of a joint rate because the American carriers have elected to become jointly and severally liable for the entire transportation charge, and because a contrary rule would force the Commission to rely upon the unpublished and possibly unverifiable divisions of the joint rate between the American carrier and the foreign carrier. This is not the situation where the American carrier and the foreign carrier each publish rates to and from a border point where interchange occurs. In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase "but only insofar as such transportation takes place within the United States" will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country.[12]

Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Third, the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holdings support its present position. The Commission relied upon *Fruit Importers v. Atlantic Coast Line R. Co.*, 203 ICC 139 (1934); *Newsprint Paper to Detroit*, 161 ICC 63 (1930); *Simpson Co. v. Grand Trunk W. R. Co.*, 129 ICC 430 (1927); *Larrowe Milling Co. v. Chatham W. & E. E. R. Co.*, 52 ICC 145 (1919); *Iron and Steel Wire, Buffalo, N. Y. to Kitchener, Ont.*, 294 ICC 515 (1955); and to a lesser extent upon *Control of Hereford Ry. Co.*, 99 ICC 7 (1925), and *Status of Napierville Junction R. Co.*, 266 ICC 471 (1946). In *Fruit Importers, Newsprint, to Detroit,*

[12] See note 10, *supra*.

Simpson Co., and *Wire, Buffalo to Kitchener*, the assailed rates were joint rates over which the Commission's jurisdiction is conceded. In *Larrowe Milling* the shipper assailed carload minima concurred in by both the Canadian and American carriers, thus presenting a situation analogous to a joint rate. In *Control of Hereford Ry. Co.*, a case involving the application of an American carrier to acquire control of a line 52.85 miles in length of which all but 0.67 miles were in Canada, and to abandon operations along this line, the Commission held it had authority to approve the acquisition under Section 5(a) but that its abandonment jurisdiction extended only to the trackage within the United States. In *Napierville Junction* the Commission held that a Canadian line whose trackage ended at the international boundary was not subject to the provisions of the Act even though its crews and equipment did conduct some operations on the one mile of track in the United States between the border and Rouses Point, N. Y. These last two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case.

Not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination international rate.[13] In *Albee Fruit*

[13] *Watab Paper Co. v. Canadian National R. Co.*, 152 ICC 265 (1929) appears to be the single exception to the above statement. Watab involved shipments of pulpwood from Manitoba points of origin approximately thirty miles north of the border to a consignee in central Minnesota. After reaching the interchange point of Warroad, Minnesota, approximately six miles south of the border, the shipments were misrouted so as not to travel along the least expensive routing. In computing damages the Commission held that the factor from the Manitoba points of origin to Warroad was unreasonable. Jurisdiction to make such a holding was premised upon a Section 4 violation, resulting from the fact that the rates from the Manitoba points of origin to Warroad were greater than the rate from the points of origin to International Falls, Minnesota, a point approximately seventy-five miles east of Warroad and a point which shipments from the points of origin could reach only by routing through Warroad. However, the Commission recognized that these circumstances were most unusual, stating at p. 268: "Where the rate from a point in Canada to a destination in the United States *is based on a combination of the rates to and from a border point within the United States, our jurisdiction ordinarily extends only to the rate within the United States.*" (Italics supplied).

Co. v. Atlantic Coast Line R. Co., 293 ICC 785. *Montreal* consignees of fresh fruit from the Florida area filed complaints as to the combination rates made over Rouses Point, N. Y. In limiting its jurisdiction the Commission stated: "The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." *Hoffman-Taff, Inc. v. St. Louis S. F. R. Co.*, 279 ICC 710, 712 (1950), involved rates on shipments of aqua ammoniac from originating points in Canada to Springfield, Missouri. The rates were combination rates made over Detroit and Port Huron, and apparently the complaint attacked only the Canadian portion of the rates. The Commission stated: "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, which for all practical purposes are international border points, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction." In *E. J. Stanton v. Atchison, T. & S. F. R. Co.*, 258 ICC 315 (1944), the Commission, after holding the American factors to be reasonable, refused to pass upon the Canadian factors of combination rates on the shipment of lumber from Los Angeles to the Maritime Provinces made over Port Huron, Detroit, Buffalo, and Rouses Point. For cases of similar import see *Dow Chemical Co. v. Alton & S. R. Co.*, 284 ICC 365 (1952); *Crelinsten v. Railway Express*, 201 ICC 284 (1934); *Fruit Importers v. Atlantic Coast Line R. Co.*, 188 ICC 520 (1932). In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States v. Leslie Salt Co.*, 350 U. S. 383, 395-97 (1956); *FTC v. Bunte Bros.*, 312 U. S. 349, 351-52 (1941).

It is contended that support for the Commission's present interpretation may be found in *Great Northern R. Co. v. Sullivan*, 294 U. S. 458 (1935). The *Sullivan case* involved the complaint of a North Dakota consignee of lignite mined in Alberta, Canada. The shipments moved on a combination rate made over an international-border point located within the United States. The Commission awarded reparations upon a finding that the American factor was unreasonable. The Supreme Court reversed, holding that an award of reparations was improper without a finding that the entire rate, *i. e.*, the sum of the American and Canadian factors, was excessive. Thus it is argued that *Sullivan* equated combination international rates with joint international rates for purposes of the Commission's jurisdiction. We believe that a closer reading of the *Sullivan case* will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury. As we read the case the Court held that a complainant seeking reparations by attacking the American factor of a combination international rate must not only demonstrate the unreasonableness of the factor over which the Commission has jurisdiction but also the unreasonableness of the sum of the combined rates.

Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points. This argument is unpersuasive. The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers. If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 ICC 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 ICC 575 (1926). We merely hold that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United

States as will give the Commission jurisdiction over the foreign factor of the combination rate.

The orders described in note 2, *supra*, are annulled and set aside, and the cause is remanded for further proceedings in conformity with this opinion.

STERRY R. WATERMAN,
U. S. Circuit Judge.

I concur:

JAMES T. FOLEY,
U. S. District Judge.

I concur:

ERNEST W. GIBSON,
U. S. District Judge.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., Et Al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

ORDER

The motions for reconsideration filed March 17, 1960 (1) on behalf of the United States of America and the Interstate Commerce Commission, defendants, and (2) on behalf of intervening defendants, are severally denied.

STERRY R. WATERMAN,
U. S. Circuit Judge.

JAMES T. FOLEY,
U. S. District Judge.

ERNEST W. GIBSON,
U. S. District Judge.

Endorsed: Filed March 26, 1960.

ARNOLD A. MURRAY,
Clerk.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., Et Al.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

ORDER

Upon application of the intervening defendants, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, it appearing to the satisfaction of the Court that good cause has been shown for the enlargement of the time allowed for docketing this cause in the Supreme Court of the United States, it is hereby

ORDERED, that the time for docketing this cause in the Supreme Court of the United States be extended from July 5, 1960 to July 23, 1960.

DATED at Brattleboro, this 14th day of June, 1960.

ERNEST W. GIBSON,
United States District Judge.

Endorsed: Filed June 14; 1960.

ARNOLD A. MURRAY,
Clerk.

Appendix D

INTERSTATE COMMERCE COMMISSION

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY Et Al.

Submitted March 9, 1953 Decided May 25, 1953.

Rates on crude asbestos and asbestos fibre, in carloads, from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte, N. C., found not shown to have been or to be unreasonable, but to be unduly prejudicial. Undue prejudice ordered removed, and reparation denied.

H. V. Fleming for complainant.

Paul F. Robinson, J. A. Kane, and *J. Edgar McDonald* for defendants.

REPORT OF THE COMMISSION

Division 3, Commissioners Patterson, Johnson, and Knudson by Division 3:

Exceptions to the examiner's proposed report were filed by the complainant. Our conclusions differ from those recommended by the examiner. Exceptions and suggested findings not specifically discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

The complainant is a corporation engaged at Charlotte, N. C., in the manufacture, sale, and distribution of asbestos textile fabrics. By complaint filed on June 22, 1951, it alleges that the rates charged for the transportation of nume-

rous carload shipments of crude asbestos and asbestos fibre from Black Lake, Coleraine, and Thetford Mines, Province of Quebec, Canada, to Charlotte were and are unreasonable and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pedente lite*.

The assailed rates[1] are combinations of rates to and from Newport, Vt., a port of entry near the Canadian border. The rates from the Canadian origins to Newport are 53 cents on crude asbestos and 28 cents on asbestos fibre, minimum weight 40,000 pounds, and the rates from Newport to Charlotte on the respective commodities are $1.41 and $1.06, minimum 30,000 pounds.

At the hearing the defendants suggested that the complaint be limited to the rates from Newport to Charlotte on the premise that otherwise this Commission would be without jurisdiction. The complainant refused to so limit the complaint primarily because the allegations of unlawfulness were based in part on the measure of the joint rates maintained by some of the defendants and other rail lines on the same commodities from the same Canadian origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Under the Interstate Commerce Act our jurisdiction applies to this transportation only to the extent that it takes place in the United States. It is well settled that the railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the border, in which event they are answerable only for those rates, or they may participate in joint international rates and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co. v. New York Central R. Co.*, 275 U. S. 179; *Buckerfield's v. Atchison, T. & S. F. Ry. Co.*, 280 ICC 15, 18. So far as the instant traffic is concerned, the defendants have not entered into joint rates from the Canadian origins to Charlotte.

Although the complaint does not specifically attack the rates from Newport to Charlotte separate and apart from the combinations of rates to and from Newport, both the

[1] Rates are stated in amounts per 100 pounds, and are those in effect just prior to the general increases authorized on March 12, 1951.

complainant and the defendants introduced evidence relating to the rates from Newport. For example, the complainant compares the rate of $1.06 on asbestos fibre from Newport to Charlotte, 972 miles, with a rate of 72 cents, minimum 50,000 pounds, on woodpulp from Berlin, N. H., to Charlotte, 965 miles. Other rates on woodpulp from Berlin to various points in southern territory range from 66 to 89 cents for distances of from 804 to 1,575 miles. The rate of $1.06 is compared also with a rate of 81 cents, minimum 30,000 pounds, on flax mill waste or sweepings from Lee, Mass., to Pisgan Forest, N. C., 851 miles, and a rate of 73 cents, minimum 50,000 pounds, on logs, native wood, from Beecher Falls, Vt., to Hampton, S. C., 1,340 miles. At the time of the hearing all of these commodities were rated eighth class, in carloads, in the southern classification, but the complainant's witness had no knowledge of the average loadings or the movement, if any, under the compared rates.

Most of the asbestos fibre used by the complainant consists of No. 3 or spinning fibre, which has a value ranging from about $320.00 to $525.00 per net ton, f. o. b. mines. It also receives an occasional carload of crude asbestos, which has a value of from $675.00 to $1,300.00 per ton. Very little evidence was introduced with respect to the rate on the latter commodity, except that certain unidentified rail carriers maintain a joint rate of $1.32, minimum 40,000 pounds, on crude asbestos from the Canadian origins to Milwaukee and Waukegan.

The rate on asbestos fibre from Newport to Chicago, Milwaukee, and Waukegan is $1.14, minimum 30,000 pounds, as compared with the rate of $1.06 to Charlotte. The rate of $1.06 from Newport to Charlotte is a commodity rate which is 10 cents less than the class-rate basis, whereas the defendants show that class rates generally apply to other destinations in southern territory. The defendants refer also to numerous proceedings before this Commission in which carload ratings higher than eighth class have been prescribed or approved on various commodities with values within the range of those on asbestos fibres.

Numerous rail carriers, including some of the defendants herein, participate in joint international rates of $1.01

on asbestos fibre and $1.32 on crude asbestos, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. The short-line distances from Thetford Mines, for example, are 992 miles to Chicago, 969 miles to Milwaukee, and 1,019 miles to Waukegan, as compared with the short-line distances of 1,080 miles from Thetford Mines to Charlotte. Shipments to Chicago, Milwaukee, and Waukegan generally move over the lines of the Quebec Central Railway Company to Sherbrooke, Quebec, thence the lines of the Canadian Pacific Railway Company to Detroit, Mich., and the lines of connecting carriers beyond, for distances ranging from 1,000 to 1,143 miles to Chicago, from 1,071 to 1,245 miles to Milwaukee, and from 1,085 to 1,209 miles to Waukegan.

In the sale of its products the complainant is in competition with manufacturers at Chicago, Milwaukee, and Waukegan, and the differences in the freight rates are an important factor in making sales.

The complainant contends that the foregoing rate adjustment results in undue preference of its competitors at Chicago, Milwaukee, and Waukegan, and in undue prejudice to it. In April, 1949, the southern rail lines proposed the establishment of joint rates, lower than the combinations then in effect from the Canadian origins to Charlotte, but the proposal was disapproved by the Canadian lines. So far as appears, the service rendered in connection with this traffic to Charlotte is no greater or more expensive than that, on the average, to Chicago, Milwaukee, and Waukegan.

The defendants state that the rates from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan were originally made with relation to the rates from Sherbrooke, and that the rates from the latter point to these destinations reflected water-competitive conditions then existing on the Great Lakes. There is no evidence, however, that there is any current or prospective water competition which might justify rates to Chicago, Milwaukee, or Waukegan on a lower level than to Charlotte.

The claim is made by the defendants also that the Canadian rail lines constitute a complete route from the Quebec origins to Chicago and Milwaukee, thereby controlling

the rates to those points, and that the United States lines must join in those rates or forego the traffic. We cannot compel the Quebec Central or any of the other defendants to join in the establishment of joint rates from the Canadian origins to Charlotte. However, that carrier, which is a subsidiary of the Canadian Pacific[2], and the latter carrier effectively participate in the rates to both Chicago, Milwaukee, and Waukegan, and to Charlotte. Newport is about 5 miles south of the Canadian border, and the Quebec Central and Canadian Pacific are the only rail carriers serving that point. Traffic therefrom to Charlotte must move for some distance beyond Newport on the Canadian Pacific before connection can be made with a United States carrier. It is thus within the power of the Canadian Pacific to put an end to the alleged undue prejudice by refusing to continue to participate in the joint rates to Chicago, Milwaukee, and Waukegan herein shown to be preferential, or, especially since the United States carriers appear to be willing, by reducing the rate to Charlotte. *Peters Cartridge Co. v. Director General*, 73 ICC 311, 314.

The evidence is clear that the complainant's competitors at Chicago, Milwaukee, and Waukegan are being unduly preferred to the undue prejudice and disadvantage of the complainant. There is no showing, however, with sufficient particularity to warrant an award of reparation, that the complainant has been damaged by reason of any undue prejudice which may have existed in the past.

We conclude that the assailed rates are not shown to have been or to be unreasonable, but that they are, and for the future will be, unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from Black Lake, Coleraine, and Thetford Mines to Chicago, Milwaukee, and Waukegan. An order for the future will be entered.

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[2] See *Lease of Line by C. P. Ry.*, 105 ICC, 575, 576.

Appendix E

INTERSTATE COMMERCE COMMISSION

No. 30846[1]

THERMOID COMPANY, SOUTHERN DIVISION v. BALTIMORE & OHIO RAILROAD COMPANY, Et Al.

Decided May 7, 1958

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1. Rates on crude asbestos and asbestos fiber from Danville, St. Malachie, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Quebec, Canada, to Charlotte, Davidson, and Marshville, N. C., and North Charleston, S. C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and for the future found to be unduly prejudicial. Reparation awarded, and defendants required to remove the unlawfulness found to exist.
2. Commission found without jurisdiction to prescribe just and reasonable joint through international rates for the future. Prior findings, 288 ICC 793, modified.

Appearances as shown in prior report, and:

E. B. Ussery, Harvey L. Golden, and *H. V. Fleming* for complainants.

J. Edgar McDonald, R. C. Gill, Donal L. Turkal, James L. Tapley, and *J. Raymond Hoover* for defendants.

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[1] This report embraces also No. 31683, Raybestos-Manhattan, Inc., *General Asbestos & Rubber Division v. Baltimore & Ohio Railroad Company et al.*; No. 31684, *Thermoid Company, Southern Division v. Same*; No. 31685, *Union Asbestos & Rubber Company v. Same*; and No. 31686, *Carolina Asbestos Company v. Same.*

REPORT[2] OF THE COMMISSION

By the Commission:

Exceptions were filed by the defendants to the report proposed by the examiner, the complainants replied, and the issues were orally argued before us. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings on conclusions have been considered and found not justified.

In the title proceeding, the complainant, a corporation engaged at Charlotte, N. C., in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed on July 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte were and are unjust, unreasonable, and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

In the prior report in that proceeding, 288 ICC 793, division 3 found that the assailed rates had not been shown to have been or to be unjust or unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceedings reopened for oral argument and reconsideration. Thereafter, upon petition of the complainant, the proceeding was reopened for further hearing, which was held with the embraced proceedings on a consolidated record.

In No. 31684, the same complainant, by complaint filed on December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and

[2] On further hearing in No. 30846.

unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of complainant's competitors located in those territories. We are asked to prescribe lawful rates for the future.

In No. 31683, by complaint filed on December 6, 1954, and in Nos. 31685 and 31686, by complaints filed on December 13, 1954, the complainant corporations, which likewise are engaged in the manufacture, sale, and distribution of asbestos textile products, at North Charleston, S. C., and Marshville and Davidson, N. C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada, to North Charleston, Marshville, and Davidson were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory, adjacent thereto, are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is engaged also in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are unlawful in like respects. These complainants ask us to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

The most important variety of asbestos commercially, of which there are several, is chrysotile, which constitutes about 95 percent of world production. Domestic production of asbestos in negligible, and American manufacturers are dependent upon foreign supplies. The most important commercial production of asbestos of the chrysotile variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide between Danville and East Broughton, and embraces most of the origin points here concerned. Black Lake, Coleraine, Thetford Mines, Robertson, and

East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke to Valley Junction, Quebec, Canada, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, Quebec, and St. Malachie is on the lines of the same carrier extending eastward from Diamond, Quebec, Canada. There is no record of any movement from St. Joseph, and that point will not be further considered.

On the basis of use, asbestos falls into two principal classes; namely, spinning and nonspinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Nonspinning fibers consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

The rates [3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste, and asbestos refuse and shorts. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for ratemaking purposes, and Thetford Mines and Danville will hereinafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory, and points in western territory adjacent thereto, the defendants maintain joint through international commodity rates. The rates from Danville are substantially lower than those from Thetford Mines, although the distances do not vary greatly. To southern destinations, however, no joint through rates are maintained, and the complainants are required to pay

[3] Rates are stated in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of a joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore to the considered destinations, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates apply on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,[4] where it connects with the Canadian Pacific. These are the only rail carriers serving Newport. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Danville on shipments routed to Marshville through Rouses Point, N. Y., another customs port of entry located about 0.5 mile from the international boundary, at which the shipments are interchanged by the Canadian National with The Delaware and Hudson Railroad Corporation. Until about November, 1955, shipments routed from Danville through East Alburgh, and charged at that rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, Canada, for operating convenience, and on such shipments no transportation within the United States was performed

[4] By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific Railway Company. See *Canadian Pacific Ry. Co. Lease*, 105 ICC 575, 576.

by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, are 33 cents, minimum 40,000 pounds, on crude asbestos, 28 cents, minimum 40,000 pounds, and 25 cents, minimum 80,000 pounds, on asbestos fiber, and 14 cents, minimum 60,000 pounds, and 13 cents minimum 80,000 pounds, on asbestos refuse and shorts. On asbestos waste from Thetford Mines to Newport, the proportional rates are 20 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds. On asbestos waste from Danville to Baltimore, the joint through rates are 53 cents, minimum 60,000 pounds, and 48 cents, minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35 [5], minimum 50,000 pounds, asbestos fiber is rated class 35, minimum 30,000 pounds, asbestos shorts and waste are rated class 27.5, minimum 40,000 pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport to the same respective destinations, the class 35 rates are $1.24, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville, apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth-class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-rate routing. Because of lesser increases imposed on commodity

[5] Class numbers represent percentages of the docket No. 28300 first-class rates.

rates than on class rates, and the adjustment of class-rate scales under our order in docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth-section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory; and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are manufactured by concerns with plants at Ambler, Pa., Manville, N. J., North Brookfield, Mass., Chicago, Ill., Meredith, N. H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cincinnati, Ohio, Rutherford, N. J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of 0.1 to 0.25 cent per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint through international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents, and later 10 cents, over the Sherbrooke rates. In September, 1954, after a few rates on asbestos fiber had been established with an 80,000-pound minimum to a limited number of points, similar rates were published to numerous destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the com-

plainants do not have the advantage of such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds.

The table in the appendix hereto compares representative applicable joint through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston. It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. Asbestos producers on the Quebec Central, on shipments to points in official territory, absorb these rate differences, so that for all practical purposes receivers in that territory receive the benefit of the Canadian National rates. The complainants raise no issue concerning these rate differences as such, but ask that, if relief is afforded them, similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distance. For example, the rates on asbestos fiber from Danville to Ogdensburg, N. Y., 209 miles, and to Winchester, Va., 700 miles, are the same as the rates to Ambler and Manville, 68 cents, minimum 40,000 pounds and 61 cents, minimum 80,000 pounds, and the same rates apply to practically all points in trunkline territory from New York, N. Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thetford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1,024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1,026 miles, and to Hannibal, Mo., 1,149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08, minimum 60,000 pounds, and $1.07, minimum 80,000 pounds, and the joint through rates on the same respective

minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from Thetford Mines, the combination rates to Davidson are $1.14, minimum 60,000 pounds, and $1.12, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago, and 67 cents and 60 cents to St. Louis.

Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the docket No. 15879 class rates formerly prescribed for application within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official-territory points with the class rates and with combination rates constructed as are the rates to the complainants' destinations. For example, on crude asbestos from Thetford Mines to Ambler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate $1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

Asbestos is produced at Matheson, Ontario, and Vancouver, British Columbia, Canada. The rates on crude asbestos and asbestos fiber from Matheson to Chicago and St. Louis are the same as those from Danville, for comparable

distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the considered Carolina destinations, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana points; $1.01 to group D embracing Chicago; and 93 cents to group E-4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destinations, the rate to group K was reduced to $1.38. This rate was likewise made applicable to group A points, and the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson, Calif., for distances approximately 2.5 times those to the Carolina destinations, on asbestos fiber are $1.72 and $1.89, minimum 60,000 pounds, and $1.28 and $1.45, minimum 80,000 pounds; on asbestos waste, $1.13 and $1.27, minimum 80,000 pounds; and on asbestos refuse and shorts, $1.13 and $1.22, minimum 80,000 pounds.

The complainants have lost ground in recent years in their efforts to compete in the sale of asbestos textile products, particularly since the readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000 pounds. The proportion of the industrywide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first 3 months of 1955. In 1949 this complainant marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 that percentage dropped to 80.2. Raybestos-Manhattan, Inc., experienced a decline in its proportion of total industry production from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952, the production of asbestos

textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production. By 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has generally maintained its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official-territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles has been confined to North Carolina and South Carolina by reason of the competition from official territory producers, and even there the competition is keen.

In April, 1949, the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte, but the proposal was disapproved by the other lines. The defendants show that traditionally rates from Canadian origins to points in the South are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction in these proceedings only over the rate factors applicable southbound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the South, with which they compare favorably. They contend, also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian carriers, over their lines from border points in Michigan, can effect delivery without participation of United States carriers. They admit, however, that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate

adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, particularly upon the establishment of the 80,000-pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500.00 to $1,500.00 per ton, milled asbestos spinning fibers at $300.00 to $525.00 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75.00 to $80.00 a ton, and assert that, in their view, the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories*, 299 ICC 375, and were there found not shown to be just and reasonable, and ordered canceled. The defendants show also, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of the shipments to the Carolina destinations are of spinning grades, that the reverse is true in official and western territories, and that there are few, if any, shipments of spinning fibers from these origins to points west of Akron, Ohio. Based on the latter circumstances, it was indicated at the hearing that a revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor-carrier competition, but the record is clear that the present rate structure was effected long before motor competition was a factor.

The complainants contend that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the prescription of joint through rates from the Canadian origins to their destinations reasonably related to the rate structure maintained to official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.

Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co. v. New York Central R. Co.*, 275 U. S. 179; *Buckerfield's v. Atchison, T. & S. F. Ry. Co.*, 280 ICC 15. We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.

The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers

to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary. In *Fruit Importers v. Atlantic Coast Line R. Co.*, 203 ICC 139, 143, the defendants challenged our jurisdiction to pass upon the reasonableness of joint through rates to Canada because they had published just and reasonable rates to Rouses Point, regarded generally as a Canadian border point. Division 4 pointed out, however, that the rates to Rouses Point were local rates and that if, as the defendants contended, they were intended to apply to the Canadian border, they should have been so published in clear and unequivocal terms. In *Newsprint Paper to Detroit*, 161 I CC 657, division 5 stated, at page 639:

It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transportation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was in violation of section 6 of the act. We have under the circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom.

In *Charles S. Simpson Co. v. Grand Trunk W. Ry. Co.*, 129 ICC 430, division 4 considered the reasonableness of refrigeration charges from Port Huron, Mich., an interchange point between the Grand Trunk Western and the Canadian National, to Toronto, Ontario, and Montreal, Quebec, Canada, and found them not unreasonable. In *Larrowe Milling Co. v. Chatham, W. & L. E. R. Co.*, 52 ICC

145, which involved the charges on beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey, reparation was awarded against the carriers that performed the haul within the United States, although it was stated that the haul performed by the Michigan Central Railroad Company to Suspension Bridge, N. Y., was almost wholly without the boundaries of the United States. In *Iron or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 ICC 515, the respondents contended that this Commission should not take jurisdiction over rates which included hauls of only 6.84 miles within the United States to the Canadian border, the distance therefrom to the Canadian destination approximating 122 miles. The contention was rejected by division 3.

In other proceedings not concerned with the matter of rates, we have noted jurisdiction over that portion of a rail line extending south of the Canadian border even though the haul within the United States was small as compared with the total mileage. In *Hereford Ry. Co. Control*, 99 ICC 7, division 4 authorized the Maine Central Railroad Company to acquire control of the Hereford Railway Company, a Canadian carrier 52.85 miles long, and to abandon that portion of the line extending 0.67 mile into Coos County, N. H. In *Status of Napierville Junction Ry. Co.*, 266 ICC 471, it was found that the respondent was not a common carrier subject to part I of the act since its operations stopped at the Canadian-United States boundary, and the haul therefrom to Rouses Point, 1.1 miles, was performed by The Deleware and Hudson Railroad Corporation.

The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.

As above indicated, the defendants maintain joint through commodity rates from the considered Canadian origins to numerous points in official territory. The rates

shown in the appendix hereto to Ambler apply to 26 destinations on crude asbestos for distances ranging from 377 to 678 miles, and averaging 513 miles, from Danville, and from 455 to 719 miles, averaging 553 miles, from Thetford Mines; and on asbestos fiber to over 150 destinations for distances ranging from 209 to 710 miles, averaging 493 miles, from Danville, and from 314 to 788 miles, averaging 545 miles, from Thetford Mines. The range in distances on asbestos refuse and shorts is about the same as on asbestos fiber. Thus, it appears that Ambler, where asbestos products are manufactured (529 miles from Danville and 570 miles from Thetford Mines), is a representative destination in these groupings.

From Thetford Mines to Ambler, the commodity rates of 97 cents, minimum 40,000 pounds, on crude asbestos, 86 cents, minimum 40,000 pounds, on asbestos fiber, 58 cents, minimum 60,000 pounds, on refuse and shorts, and 62 cents, minimum 60,000 pounds, on waste are about 86, 80, 76, and 81 percent, respectively, of what the rates would be if constructed on a combination basis in a manner similar to that used in constructing the rates to the considered Carolina destinations. The 80,000-pound commodity rates to Ambler on asbestos fiber, refuse and shorts, and waste are approximately 90 percent of those subject to the lower minimum weights. The rates herein found just and reasonable to Carolina destinations are constructed on a substantially similar basis. For example, the rate of $1.33 found just and reasonable on crude asbestos, minimum 40,000 pounds, from Thetford Mines to Charlotte is about 86 percent of the combination rate of $1.54. Moreover, the rates herein found just and reasonable to the Carolina destinations are substantially higher, distance considered, than the rates to numerous destinations in official territory. See, for example, the rates shown in the appendix hereto of $1.14, minimum 40,000 pounds, and $1.04, minimum 80,000 pounds, on asbestos fiber from Thetford Mines to Kirkwood (St. Louis), Mo., 1,198 miles, as compared with respective rates of $1.20 and $1.10 found reasonable herein on the same commodity from the same origin to Charlotte, 1,083 miles.

It is clear that the complainants' competitors at Ambler and other destinations in official territory are being unduly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. The rates from the Quebec Central mines generally are on a higher level to points in official territory than those from the Canadian National mines, and appear to represent reasonable maxima. Equitable treatment of the complainants would require, however, that they be accorded rate levels from the Canadian National mines which are relatively the same as those available to receivers in official territory in order to remove the undue preference and prejudice found to exist. As stated, we have no authority to prescribe for the future joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on international traffic to the extent that the transportation takes place within the United States.

We find that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, and Warwick, rates of $1.33, minimum 40,000 pounds, on crude asbestos, and $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, on asbestos fiber to Charlotte; and from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick of $1.33 to Davidson and Marshville and $1.41 to North Charleston on crude asbestos, minimum 40,000 pounds, of $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, to Davidson and Marshville, and $1.27, minimum 40,000 pounds, and $1.16, minimum 80,000 pounds, to North Charleston on asbestos fiber; and to Davidson of 82 cents, minimum 60,000 pounds, and 74 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and of 88 cents, minimum 60,000 pounds, and 80 cents, minimum 80,000 pounds, on asbestos waste.

We further find that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, and destinations taking the same rates, by the following amounts: On crude asbestos 36 cents, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 44 cents, minimum 40,000 pounds, from the latter origins to North Charleston; on asbestos fiber, 34 cents, minimum 40,000 pounds, and 31 cents, minimum 80,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 41 cents, minimum 40,000 pounds, and 37 cents, minimum 80,000 pounds, from the latter origins to North Charleston; and to Davidson from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, 24 cents, minimum 60,000 pounds, and 21 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and 21 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds, on asbestos waste.

We further find that on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

We further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, were damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases herein found to have been just and reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In instances where shipments from Danville and Warwick were interchanged by the Canadian National at St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp. v. Holton I.-U. R. Co.*, 164 I. C. C. 505, 510.

To all of the rates resulting from the findings herein may be added the applicable general increases authorized on and subsequent to March 12, 1951.

An order will be entered vacating the prior order in No. 30846, and requiring the removal of the undue preference and prejudice found to exist.

CHAIRMAN FREAS dissents.

COMMISSIONERS MITCHELL and GOFF did not participate in the disposition of this proceeding.

APPENDIX

To—	Crude asbestos				Asbestos fiber			
	From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada		From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada	
	Short-line distance	Rates,[1] minimum 40,000 pounds	Short-line distance	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds
	Miles	*Cents*	*Miles*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Manville, N. J.	480	68	521	97	88	61	98	79
Ambler, Pa.	529	68	570	97	88	61	98	79
Chicago, Ill.	907	103	987	132	85	77	101	98
Kirkwood (St. Louis), Mo.	1,118		1,198		97	87	114	104
Richmond, Va.	782		823		100	90	118	106
Charlotte, N. C.	1,042	130	1,083	154	134	131	134	131
Davidson, N. C.	1,031	149	1,072	152	134	131	134	131
Marshville, N. C.	1,068	152	1,109	156	136	133	136	133
North Charleston, S. C.	1,173	159	1,216	168	154	151	158	155

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 50,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 80,000 pounds beyond.

Appendix F

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of May, A. D. 1958.

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

No 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and the prior report in No. 30846, 288 ICC 793, are hereby

referred to and made a part hereof; and the Commission having found in the report of even date that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, in carloads, from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, Quebec, Canada, to certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants and unduly preferential of the complainants' competitors to the extent indicated in said report of even date:

It is ordered, That the defendants named in the complaints, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue prejudice and preference referred to in the preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

And it is further ordered, That the order of May 25, 1953 in No. 30846, be, and it is hereby, vacated and set aside, and that this order shall continue in force until the further order of the Commission.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

Appendix G

ORDER

INTERSTATE COMMERCE COMMISSION

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

No 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

IN THE MATTER OF DEFENDANTS' PETITION TO SHORTEN THE NOTICE UPON WHICH ACTION REQUIRED BY ORDER MAY BE TAKEN.

PRESENT: KENNETH H. TUGGLE, Chairman, to whom the above-entitled matter has been assigned for action thereon.

The Commission, Division 3, issued its report in No. 30846, 288 ICC 793, decided May 25, 1953, and the entire Commission issued its report in the above-entitled pro-

ceedings including No. 30846, on further hearing, 303 ICC 743, decided May 7, 1958. Upon consideration of the records in these proceedings, and a petition of the defendant railroads for further modification of the order of May 7, 1958, to authorize the defendants to comply therewith upon not less than 10 days' notice, and for good cause shown:

It is ordered, That the petition be, and it is hereby, granted, and that the order entered in these proceedings on May 7, 1958, as modified, requiring the defendants to take certain action on or before March 26, 1959, upon not less than 30 days' notice, be, and it is hereby, further modified so as to authorize the action upon not less than 10 days' notice, without change in the effective date.

Dated at Washington, D. C., this 19th day of February, A. D., 1959.

By the Commission, Chairman Tuggle.

HAROLD D. McCOY,
Secretary.

(SEAL)

Appendix H

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 11th day of March, A. D., 1959.

No. 30846
THERMOID COMPANY, SOUTHERN DIVISION
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683
RAYBESTOS-MANHATTAN, INC.
GENERAL ASBESTOS AND RUBBER DIVISION
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684
THERMOID COMPANY, SOUTHERN DIVISION
v.
THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685
UNION ASBESTOS & RUBBER COMPANY
v.
SAME

No. 31686
CAROLINA ASBESTOS COMPANY
v.
SAME

It appearing, That the Commission, Division 3, issued its report in No. 30846, 288 ICC 793, decided May 25, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 ICC 743, decided May 7, 1958;

It further appearing, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complianants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

It is ordered, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

It is further ordered, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

And it is further ordered, That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

Appendix I

Statutes Involved

Section 1 (1), (a) and (2) (49 U.S.C. §1(1)(a) and (2))

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment;

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

Section 1(4) and (5) (49 U.S.C. § 1(4) and (5)).

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or

charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 2 (49 U.S.C. §2).

That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3(1) (49 U.S.C. §3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6(1) and (7) (49 U.S.C. § 6(1) and (7)).

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8 (49 U.S.C. § 8).

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in con-

sequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 13(1) (49 U.S.C., § 13(1)).

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts: whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 16(1) (49 U.S.C., § 16(1)).

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

257 *

UNITED STATES OF AMERICA, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO AFFIRM

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* Together with No. 258, *Interstate Commerce Commission v. Central Vermont Railway, Inc., et al.*, and No. 266, *United States of America v. Central Vermont Railway, Inc., et al.*

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IN THE

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OCTOBER TERM, 1960

No. 257*

UNITED STATES OF AMERICA,

Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO AFFIRM

Opinions Below

The opinion of the United States District Court for the District of Vermont is reported at 182 F. Supp. 516, and is set forth in Appendix A to this motion. The report of the Interstate Commerce Commission dated May 7, 1958, is reported at 303 I.C.C. 743, and that report and the orders of the Commission, dated May 7, 1958, and March 11, 1960, are set forth in Appendix B hereof.

* Together with No. 258, *Interstate Commerce Commission* v. *Central Vermont Railway, Inc., et al.*, and No. 266, *United States of America* v. *Central Vermont Railway, Inc., et al.*

Statute Involved

The pertinent provisions of the Interstate Commerce Act are contained in Sections 1(1), 1(2), 1(5) and 3(1) thereof, 49 U.S.C. 1(1), 1(2), 1(5) and 3(1), and are set forth in Appendix C hereof:

Question Presented

Throughout the proceedings before the Interstate Commerce Commission, as well as before the District Court, the appellees took the position that the Commission lacked jurisdiction to deal with the complaints filed with it because they assailed a combination of rates on traffic from origins in Canada to destinations in the United States, consisting of proportional rates published by individual Canadian railroads for application from Quebec origins to the ports of entry and interchange points within the United States, three and five miles from the international border, and the separately established domestic rates published by the United States railroads from such ports of entry and interchange points to the destinations.

The District Court held that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate".

The basic question is, therefore, does the Interstate Commerce Commission have jurisdiction in this instance merely because the combinations of rates were made over United States ports of entry a few miles within the United States instead of over the exact boundary line. Stating the question another way, does the purely incidental handling of international traffic by a Canadian railroad from

the international boundary to a United States port of entry or interchange point adjacent to the international border, solely for the purpose of delivering the traffic at such point to an American railroad for transportation within the United States, constitute such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate.

Statement of the Case

This proceeding is the outgrowth of five complaints filed with the Interstate Commerce Commission, each of which assailed *combination rates* and charges applicable on carload shipments of asbestos from Quebec origins to Carolina destinations, alleging them to be unjust and unreasonable and unduly preferential and prejudicial, in violation of Sections 1 and 3, respectively, of the Interstate Commerce Act. The prayer of each complaint asked the Commission to require the defendant railroads to establish just and reasonable rates for future application on such shipments and to award reparation on past shipments.

In its report (Appendix B) the Commission found the assailed rates "insofar as the transportation took or takes place within the United States" were and are unjust and unreasonable to the extent that they exceeded and exceed specific rates set forth therein. The Commission further found that the rates on the various kinds of asbestos from the Canadian origins to the American destinations involved in the complaints, "insofar as the transportation takes place within the United States", are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in other destination states, including Pennsylvania, to the extent that the combination rates to the Carolina destinations exceed or may exceed the joint rates to Ambler, Pa., and destinations taking the Ambler basis of rates, by the specific amounts set forth therein. The Commission further found the complainants

were damaged and entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the basis found in the report to have been just and reasonable.

The *combination rates* assailed each consisted of two factors, a Canadian factor and an American factor. In each instance the Canadian factor was a single line rate published either by the Quebec Central Railway Company, a Canadian railroad, for application on the involved commodities from origins in Quebec on that railroad to Newport, Vt., a United States port of entry, and also the point nearest the exact international boundary where that Canadian railroad interchanges traffic with its American connection, or by the Canadian National Railways, likewise a Canadian railroad, for application on the involved commodities from Quebec origins on that railroad to East Alburgh, Vt., another United States port of entry and also the point nearest the exact international boundary where that Canadian railroad interchanges the traffic with its American connection. The American factor in all instances was a rate published to apply from Newport or East Alburgh, Vt., to the Carolina destinations involved.

East Alburgh and Newport, Vt., the points where the Canadian railroads turn the cars over to their American railroad connections, are three and five miles, respectively, south of the international boundary. As ports of entry, those points are also places where Customs inspection of incoming railroad freight is made and, as such, are for all practical purposes border points.

The individual Canadian railroads which publish the single line Canadian factors alone control the measure of those rates. No American railroad had any voice in the publication of those rates or in fixing the level thereof. The American lines alone control the measure of the American factors. Neither the Quebec Central nor the Canadian National Railways had any voice in the establishment of those rates or in fixing the level thereof.

For those reasons, from the very beginning of this litigation the appellees have steadfastly contended that Newport and East Alburgh, Vt., were, for all practical purposes, international border points adjacent to the international boundary. They have contended that only the American factors applicable from those points to the Carolina destinations and the transportation under those rate factors are subject to the jurisdiction of the Commission. They have further contended that for those reasons the complaints filed with the Commission, which did not put in issue the lawfulness of the American factors, assailed rates not within the purview of the Interstate Commerce Act, and consequently beyond the jurisdiction of the Commission.

A. The Commission Decision

The report of the Commission dealing with the jurisdictional contention of the appellees reads in part as follows:

> "The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.
>
> "Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear alternative with respect to their participation in international traffic. They may publish

rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15. We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.

"The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

"While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary." (Appendix B, pp. 57, 58)

And:

"The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect

the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication". (Appendix B, p. 60)

B. The District Court Opinion

Recognizing the jurisdictional question raised by the railroads as the crux of this case, the District Court decision stated at the outset:

> "A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?" (Appendix A, p. 30)

It noted (Appendix A, p. 33) that the appellees' argument before that Court was "confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas".

It cited those parts of the Interstate Commerce Act here pertinent and stated that, as the Commission itself had emphasized in its decision:

> "• • • it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into

joint rates for international transportation. See *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U. S. 654, 660 (1931); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, 523 (1932); *International Nickel Co.* v. *Director General*, 66 I.C.C. 627 (1922). However, it is equally well settled that the Commission does have power to pass upon the legality of existing joint rates on international transportation, and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation 'only insofar as such transportation * * * takes place within the United States.' See *Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 I.C.C. 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co.* v. *Director General*, 66 I.C.C. 627 (1922). The Supreme Court has upheld the Commission's interpretation in two cases, *News Syndicate Co.* v. *New York Cent. R. Co.*, 275 U. S. 178 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U. S. 654 (1931)." (Appendix A, pp. 34, 35)

The District Court then pointed out that the rates which the Commission found unreasonable and prejudicial in its report were not *joint* rates, but *combination* rates; that the Commission does not dispute the appellees' statement that there are no facilities for the interchange of railroad freight available between the international boundary and East Alburgh and Newport; that the Commission does not dispute the fact that, as to shipments moving under the assailed *combination rates*, the Canadian carriers op-

erate within the United States only for the purpose of turning the shipments over to the American carriers; and that the Commission nevertheless held that it had power to review the entire transportation charge because the interchange occurred within the United States.

The District Court concluded to annul and set aside the Commission's orders for four reasons.

1. The District Court observed that "although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada". The District Court conceded (Appendix A, p. 38) that the Commission need not make that distinction when a *joint* rate is involved, but stated that was not so where the *American* railroad and the *foreign* railroad each publishes a rate to and from "a border point where interchange occurs". The Court then stated: "In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase 'but only insofar as such transportation takes place within the United States' will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country".

2. The Court stated that it would follow from court approval of the Commission action that "in situations

where the *foreign factor* is the unreasonable factor *American carriers* will be held liable for a portion of overcharges that they had no part in formulating".*

3. The Court stated the Commission was in error, "when, in its decision in the instant case, it stated that its prior holdings support its present position". The Court pointed out (Appendix A, p. 39) that "not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review *the foreign factor of a combination international rate*".* In doing so, the Court dealt analytically with a number of Commission decisions, for example with *Hoffman-Taff, Inc.* v. *St. Louis S. F. R. Co.*, 279 I.C.C. 710 (1950), and quoted from that decision as follows:

> "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, *which for all practical purposes are international border points*, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction."*

The Court then said:

> "* * * the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the

* Italics added.

Commission, without a strong showing to justify departure. *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 395-97 (1956); *FTC* v. *Bunte Bros.*, 312 U. S. 349, 351-52 (1941)."

4. The District Court rejected as unpersuasive the Commission argument that unless the Court accepted its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points.

Argument

Each of the complaints filed with the Interstate Commerce Commission, which the appellees contend is defective on its face, assails *combination rates* made over United States ports of entry adjacent to the international boundary "which for all practical purposes are international border points". Each of the complaints challenges the lawfulness of the total rates and charges applicable on asbestos shipped from origins within Canada to destinations within the United States. None of the complaints assails the lawfulness of the American factor, applicable wholly within the United States from the United States ports of entry, "which for all practical purposes are international border points", to destinations within the United States.

As the District Court stated, and as the report of the Commission itself freely recognized, it has long since become well settled law that American railroads have a clear alternative when they participate in the transportation of international traffic. They may publish rates applicable to and from the border, in which event they are answerable only for the lawfulness of those rates, or they may participate in *joint* international rates, in which event they become jointly and severally liable for any unlawfulness found in those rates.

If the rates assailed before the Commission had been *joint* rates, the possibility that either this Court or the District Court would have been called upon to review the Commission action with respect thereto is extremely remote. In this instance the American railroads elected not to participate in *joint* rates. In lieu thereof they published rates for application from United States ports of entry "which for all practical purposes are international border points" to the Carolina destinations. That election, the appellees respectfully submit, limits the jurisdiction of the Commission to a consideration, in proper proceedings, of the rates and charges fixed by the American factors alone. However, what the Commission has here done in effect is to treat the assailed combination rates as though they were in fact *joint* rates, apparently on the ground that the Canadian factors obligated the Canadian railroads "to provide substantial transportation service within the United States" and consequently may not be said to conform to the first of the two alternatives available to American railroads participating in the transportation of international traffic.

The Commission's power over transportation wholly by railroad is derived from the statute, the pertinent portions of which are set forth in Appendix C. Those provisions give the Commission authority over common carriers engaged in the transportation of property and over the transportation of property insofar as such transportation takes place within the United States. The appellees respectfully submit that the law with respect to the limitation of the Commission's power is clear, having been dealt with particularly in two cases decided by this Court.

News Syndicate Co. v. *N. Y. C. R. R.*, 275 U. S. 179, was a reparation case only and involved *joint* international rates. It did not involve rates for the future. The question there was whether or not the Commission had jurisdiction on a complaint made against United States rail-

roads alone to determine the reasonableness of a joint rate applicable from an origin in Canada to a destination in the United States. This Court there held that the Interstate Commerce Act applied to the lines that carried and to the transportation of the traffic from the international border to the destination there involved; that it was the duty of the United States railroads to establish just and reasonable rates for that service, which they had failed to do; that their failure to do so contravened the provisions of the Act and compelled the complainant before the Commission to pay the through charges complained of; and that the Commission had jurisdiction to determine whether the complainant was entitled to an award of damages, and, in the ascertainment of damages, jurisdiction to determine the reasonableness of the charges exacted. Since the Court held that the breach of the carriers' statutory duty to do so was the proximate cause of the complainant's injury, it seems fairly certain that this Court would have ruled exactly to the contrary had the United States railroads published and maintained rates applicable from the international border in that case.

Lewis, etc. Co. v. *Southern Pac. Co.*, 283 U. S. 654, also was a case involving reparation only. There the United States railroads had published and maintained rates on the involved traffic from the international border to a destination within the United States. However, that rate was not applicable on the international traffic involved in that proceeding. This Court accordingly held, as it had in the *News Syndicate* case, that the Commission had jurisdiction to determine the reasonableness of the *joint* international rate which actually applied on the traffic involved in that case. However, this Court there held that the Interstate Commerce Act does not empower the Commission to prescribe or regulate *joint* international rates, but that it applies to international commerce only insofar as the transportation takes place within the United States. It held that the Act applied to the transportation of the

traffic there involved from the boundary to destination, and required the defendant to establish just and reasonable rates for that service, rendering the defendant liable for damages resulting from its failure to do so.

The Commission itself has repeatedly cited either or both of those cases for the proposition that the United States railroads have a clear alternative of either publishing rates to and from the international border, in which event they are answerable only for the lawfulness of those rates, or of participating in *joint* rates, in which event they become jointly and severally liable for the lawfulness of those *joint* rates.

For more than forty years the Commission has held in effect that its jurisdiction over international traffic attaches at ports of entry or exit within the United States. Throughout that entire time, except in the single instance which is the cause of this litigation, where international traffic moved on *combination rates* made up of factors applicable to ports of entry or interchange points on or adjacent to the international border, the Commission has refused to construe the statute as conferring jurisdiction upon it over the transportation between the international border, on the one hand, and the ports of entry or exit or interchange points on or adjacent to the international border, on the other. It has consistently exercised jurisdiction in such cases only over that portion of the transportation covered by *the American factors of combination rates applicable wholly within the United States.* It has consistently refused to take jurisdiction over the *Canadian factor* even though that factor of the *combination rate* obligated the *Canadian* railroad to handle the traffic to or from the United States port of entry or exit.* Even in *joint* rate situations the Commission has refused to take jurisdiction over Canadian railroads, and the transporta-

* Appendix D hereof is a list of such cases.

tion they performed, when those railroads interchanged the traffic at points within the United States on or adjacent to the international border.*

Such has been the interpretation of the statute with respect to the matter of jurisdiction by the Commission itself, and for more than forty years the railroads have relied upon that construction and interpretation of the statute, as they had an absolute right to do. As the District Court said (Appendix A, p. 41), that consistent interpretation ought not to be set aside either by the courts or by the Commission without a strong showing to justify a departure therefrom.

No substantial reason has been advanced by any of the several appellants which warrants or justifies a reversal by this Court of the judgment of the District Court.

What each of the appellants has overlooked or failed to comprehend is the fact that the Commission either had jurisdiction to consider the issues raised by the complaints filed with it, or it did not. If the publication of rates to and from East Alburgh and Newport, Vt., "which for all practical purposes are international border points" amounted in effect to the publication of rates to and from the border, which would be in harmony with all prior holdings of the Commission in similar cases, and in this instance represent the adoption by the American lines of the first alternative available to them in handling international traffic, the Commission clearly was without jurisdiction to consider the complaints filed with it.

However, the holding to that effect by the District Court does not, as the appellants contend, strip the Commission of power to prevent undue preference and prejudice in the transportation of international traffic insofar as such transportation takes place within the United States. The effect of the decision in the District Court is to require complaints in instances such as those here in-

* Appendix E hereof is a list of such cases.

volved to assail the American factor applicable to or from border points. In such cases if the assailed American factors are shown to be unjust, unreasonable, unduly prejudicial or preferential by comparison with other rates, the Commission has both the jurisdiction and the authority to deal with such situations, just as it does in the case of ordinary complaints alleging violations of Sections 1 or 3 of the Interstate Commerce Act, or both.

Admittedly, the principal purpose of the Interstate Commerce Act was to prevent unlawful discrimination, prejudice, and preference, but the statute grants the Commission power to deal with unlawfulness only insofar as transportation takes place within the United States. Stated another way, admittedly the statute empowers the Commission to deal with alleged violations of Sections 1 and 3 of the Act. However, the jurisdiction of the Commission to deal with such allegations in the case of international traffic depends entirely on whether the traffic moves under *rates applicable to or from the international border*, or under *joint international rates*. If the traffic moves under *combination rates made over international border points*, the American railroads are answerable only for the lawfulness of those rates, and the jurisdiction of the Commission is limited to a consideration of complaints directed to the lawfulness of the American factors alone. If the traffic moves under *joint international rates*, the American railroads automatically become jointly and severally liable for the lawfulness of those rates, but, even in those instances, the jurisdiction of the Commission is limited to that portion of the transportation which takes place within the United States.

It may be well settled, as the Solicitor General contends it is, that when carriers enter into *joint* rates for the transportation of goods from a common originating point to certain destinations but fail to provide *joint* rates to other destinations to the prejudice of the latter, the Commission has authority under Section 3 to order the dis-

crimination ended even where the particular rates involved are not in themselves unreasonable. But that is so only when the allegedly unlawful rates are subject to the jurisdiction of the Commission, and that is not the case here.

Before the Commission can require undue prejudice or preference ended under the authority conferred upon it by Section 3 of the Interstate Commerce Act, it must have jurisdiction over the rates alleged to be unlawful. The appellees respectfully contend that, in this instance, the Commission lacks that jurisdiction. And, contrary to the contention of the Solicitor General, the right of shippers, communities, and entire regions to be free from discrimination and undue prejudice in the transportation of international traffic will not be beyond the reach of Commission control. In a proper proceeding dealing only with the lawfulness of rates published to or from the international border, the Commission would have jurisdiction to consider and authority to require the removal of any unlawfulness found to exist in such rates, whether the unlawfulness be due to unjustness and unreasonableness or to undue preference and prejudice. In such an instance, however, the Commission clearly would have no authority to remove any alleged unlawfulness, whether it be said to result from the unjust and unreasonable nature of the rates or the prejudicial and preferential nature thereof, in any instance where the alleged unlawfulness necessarily resulted from the applicability of the factor published by *Canadian* railroads for application between the international border and origins or destinations within Canada.

The crux of this matter has to do with the jurisdiction of the Commission. The question is whether the Commission had jurisdiction to deal with the issues sought to be raised by the complaints filed with it. The appellants contend that, even if the Commission is without power to determine whether the *combination rates* from the *Cana-*

dian origins to the Carolina destinations are just and reasonable, the Commission nevertheless must have jurisdiction by virtue of Section 3 to determine whether those *combination rates* are unduly prejudicial. Clearly, this contention is without substance and completely lacking in legal significance.

In referring to the statement by the District Court of the single question presented to it, the Commission argues that, while that question may be relevant in determining the validity of the Commission's finding that the assailed rates are unjust and unreasonable, it has no relevance to the Commission's separate finding that the assailed rates created undue prejudice and preference on the ground that the District Court opinion contained "no discussion of the Section 3(1) issue". In discussing that contention, the Commission, like the Solicitor General, simply failed to recognize that the basic issue in this case has to do with the jurisdiction of the Commission. Either the Commission had jurisdiction to consider and dispose of the complaints before it or it did not. If it lacked jurisdiction to consider the complaints, it was just as lacking in jurisdiction to deal with allegations of undue preference and prejudice as it was in jurisdiction to deal with allegations charging unjustness or unreasonableness. The answer to the contentions of both the Solicitor General and the Commission is that the Commission's authority to eliminate undue preference and prejudice exists only when the rates assailed and the transportation provided thereunder are subject to the jurisdiction of the Commission.

Contrary to the contention of the Commission, whether it was without jurisdiction to determine whether the combination rates from Canadian origins to Carolina destinations were just and reasonable was not an entirely separate question. The appellees have consistently contended, and the District Court in effect found, that the *Canadian* factors were simply rates from Canadian origins to the United States ports of entry adjacent to the international

border, and the *American* factors were simply rates from those border points to the Carolina destinations of the shipments. The *American* railroads were answerable only for the lawfulness of the rates applicable from the border points to the Carolina destinations, and the jurisdiction of the Commission was limited to a consideration of the lawfulness of the rates for which the *American* railroads were answerable, and the transportation provided thereunder. In the absence of a proper proceeding assailing the lawfulness of those factors, the Commission had no jurisdiction or authority to determine whether the total rates and charges here assailed were just and reasonable, just as it was without jurisdiction or authority to determine whether they resulted in undue prejudice to the complainants. What the Commisison obviously attempted to do here, as the District Court pointed out (Appendix A, p. 37), was to admit its lack of extra-territorial jurisdiction, and then proceed to exercise jurisdiction over the entire transportation and the total rates and charges.

The Commission argues that it did not rest its jurisdiction upon the mere form of the rate publication, but on the ground that it had "jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication". It argues that the rates maintained by the *Canadian* lines obligate those carriers to provide substantial transportation service within the United States. But even in its jurisdictional statement, the Commission fails, as it did in its report and in its briefs and arguments before the District Court, to indicate what "substantial transportation service within the United States" the *Canadian* lines were obligated to perform in these instances, which they were not likewise obligated to perform in all the prior cases in which the Commission construed its jurisdiction as being limited to a consideration of the *American* factors only. The Commission argues that the conclusion of the District Court that "the fact that interchange occurs a

few miles on one side of the boundary as opposed to a few miles on the other side is a fortuitous event, an event upon which Congress would hardly have intended the Commission's jurisdiction to hinge" is a doctrine of *de minimis* which is inconsistent with the basic jurisdictional definitions of Sections 1(1)(a) and 1(2). But in cases involving combination rates made over United States ports of entry or exit adjacent to the international border, the Commission itself for more than forty years refused to consider the transportation between the international boundary and the port of entry or interchange point to be such transportation as to give it jurisdiction over the foreign factor of the combination rate. As the District Court emphasized,

> "We merely hold that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate." (Appendix A, pp. 42-3)

The simple fact of the matter is that the transportation service which the *Canadian* lines were obligated to provide was as unsubstantial as the argument which the Commission is here offering in support of its alleged jurisdiction.

Finally, the Commission argues that the District Court's conclusion above quoted is inconsistent with its concession that "If * * * the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction". An inconsistency would result only if the two situations were analogous. But they are not. The trackage the Court referred to is located wholly within the United States, and an analogous rate situation would be a rate factor applying from the precise boundary to Newport or

East Alburgh. However, as the Court below observed:

> "We gather * * * that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange." (Appendix A, p. 37)

In other words, the jurisdiction which the Commission has taken over the *Canadian* rate factor embraces transportation which takes place entirely in Canada except for a 3 and 5 mile haul to the border points for the sole purpose of interchange. On the other hand, the jurisdiction over the trackage referred to by the Court is confined to that located wholly within the United States.

The argument advanced by the appellants, who refer to themselves as "southern consumers", in support of their contentions that the judgment of the lower court was in error and should be reversed, are decidedly weak and equally unsubstantial.

The first two questions sought to be presented by these appellants are substantially the same as questions presented by the other appellants. Since they do not require any further comment, the balance of this motion will be addressed to the additional contentions of these appellants.

Certainly the acts of the Canadian railroads in filing the tariffs with the Interstate Commerce Commission which published the rates applicable from the Canadian origins to the United States ports of entry could not and did not confer any jurisdiction on the Interstate Commerce Commission. *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 I.C.C. 520, 524; *Albany Packing Co.* v. *Atchison, T. & S. F. Ry. Co.*, 245 I.C.C. 741, 744.

Nor does it avail these appellants anything to argue that they assailed the through transportation charges assessed for the transportation service from the point of

origin in Canada to the point of destination in the United States. These appellants, like the Solicitor General and the Commission, overlook or ignore the basic fact that the assailed rates were not *joint* rates but *combination* rates made over the United States ports of entry "which for all practical purposes are international border points" and, as such, made the United States railroads answerable for the lawfulness of the American factors alone. Only if these rates were shown to be unlawful in a proper proceeding could the Commission find them unjust or unreasonable in violation of Section 1 of the Interstate Commerce Act or unduly prejudicial in violation of Section 3 of that Act. Something more than the bare and erroneous contention of these appellants that the assailed rates "are in fact joint through rates", and the further contention that the fact that these "joint through rates" were constructed out of existing rates from the Canadian origins to the United States ports of entry and rates from those points to the Carolina destinations "is not of legal significance", is necessary to establish the jurisdiction of the Commission which the District Court found lacking in this instance. To argue that "the through rates involved in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, and *Great Northern Ry. Co.* v. *Sullivan*, 294 U. S. 458, "were in fact joint through rates even though they were constructed on a so-called combination basis" does violence to the facts set forth in those decisions of this court. The decision in the *Sloss-Sheffield* case indicates (p. 231) that the rates there involved were joint rates. The decision in the *Sullivan* case indicates (p. 459) that the rates there involved were combination rates.

Actually, this court has already disposed of the argument the appellants here attempt to make. In the *Sloss-Sheffield* case, *supra*, this court stated (p. 233) that the establishment of a *joint* rate by the concurrence of all connecting carriers is necessarily the act of each because the establishment of that rate is done by their joint agree-

ment. In *U. S.* v. *Great Northern R. Co.*, 343 U. S. 562, this court said:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this court expressly has approved the Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes." (pp. 572-573)

In a related footnote (p. 572) it added:

> "It is the duty of every carrier to establish reasonable through routes but there is no corresponding duty to establish joint rates with other carriers. 49 U.S.C. § 1(4). Joint rates may be established either by agreement of the carriers, 49 U.S.C. § 6(4), or by Commission order, 49 U.S.C. § 15(3)."

There is clearly no merit to that argument.

On the contrary, whether the through rates here involved were *joint rates* or *combination rates made over international border points* is a fact of extremely important legal significance.

Had the American railroads joined in the establishment of *joint* rates, by the individual act of each participating carrier, American or Canadian defendant, they would have become jointly and severally liable thereby, and the Commission would have had jurisdiction to determine the nature and extent of the alleged unlawfulness insofar as the transportation took place within the United States. By electing not to agree to the establishment of *joint* rates in this instance, but to publish and maintain rates to and from the United States ports of entry only "which for

all practical purposes are international border points" where the traffic was interchanged between the Canadian and American railroads, the latter made themselves answerable only for the lawfulness of those rates and the jurisdiction of the Commission was limited by statute to a consideration of those rates.

The legal significance was *in fact* the crucial point in *News-Syndicate Co.* v. *N.Y.C.R.R., supra,* and *Lewis, Etc. Co. v. Southern Pac. Co., supra,* in both of which the failure of the American carriers to publish rates from the international border constituted a violation of the provisions of the Act and compelled the complainants before the Commission to pay the through charges complained of. The Court expressly held that the proximate cause of the losses complained of was the breach of the statutory duty to publish rates from the international boundary. Moreover, the distinction has been consistently recognized by the Commission as well in many cases involving combination rates made over ports of entry located on or adjacent to the international boundary. (Appendix D.) And, of course, the distinction is reflected in the two alternatives which the Commission has consistently held the railroads possess in publishing rates for application on international traffic.

Nor did the opinion of the District Court make it impossible for the Commission to determine the lawfulness, under Sec. 3(1) of the Interstate Commerce Act, of the rate adjustment complained of as discriminatory. The complainants before the Commission themselves made it impossible for the Commission to determine the lawfulness of the applicable rate adjustment by failing to assail the lawfulness of the *American factors* thereof which applied to that portion of the transportation wholly within the United States, and the only transportation over which the Commission had jurisdiction. Contrary to the contention of these appellees, the jurisdiction of the Commission

under Section 3(1) of the Act does depend upon its jurisdiction under Section 1(1) and 1(2) of the Act. The jurisdiction of the Commission is especially conferred upon it by those sections which are set forth in Appendix C hereof. The provisions of Section 1(1) and 1(2) are clearly applicable not only to Section 1 and the subdivisions thereof, but to Section 3(1) and to all other sections of that chapter or part of the Act also.

Nor does *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, support the contrary argument of these appellants. That case did not involve international traffic. It involved an allegedly discriminatory rate situation which existed between intrastate and interstate traffic, and the issue was whether or not the limiting provision of Section 1, relating to transportation "wholly within one state", limited the jurisdiction of the Commission to deal with the alleged discrimination. In that decision, the Court did not hold, as these appellants contend, that jurisdiction under Section 3(1) does not depend upon jurisdiction under Section 1(1) and 1(2), but rather that the limiting provision referred to had no application because interstate traffic was involved. The Court said:

> "The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one state'. These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is involved." (p. 358)

If, in the instant case, the domestic factor of the *combination rate* were assailed as being unduly discriminatory, then the limiting provisions of Section 1 would be in-

applicable as in the above case. However, the Southern Consumers assailed international rates without limitation or restriction, and sought the prescription of international rates without limitation or restriction. The statute does not give the Commission jurisdiction to prescribe or regulate such rates. *Lewis, Etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654, 660.

Actually, the *Houston* case not only fails to support the appellants, but supports the contentions of the appellees. In discussing the language of Section 3, the Court there said:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described *which it was within the power of Congress to condemn.* There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier. It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at, and there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce *which it had authority to reach.*" [Italics added.] (p. 356)

The contention of these appellants that, should the judgment of the District Court be permitted to stand, they would be at the mercy of the appellees and that, by the simple selection of the method of tariff publication, the appellees could destroy any business enterprise in the United States which depended upon raw materials produced in an adjacent foreign country is too preposterous to call for any reply.

Nothing in the *News Syndicate* case cited by these appellants supports their contention that "the Commission

had authority to hear the complaints under Section 13(1) of the Act (49 U.S.C. 13(1)) and under Section 16(1) of the Act (49 U.S.C. 16(1)) had jurisdiction to award damages for the violation". The rates assailed in the *News Syndicate* case were *joint* rates, not *combination* rates made over international border points.

These appellants contend that the appellees have not complied with the Act by establishing rates from the international boundary line to the Carolina destinations. The shallowness of that contention is made self-evident by the further contention of the appellants that "such would be true even if we were to consider East Alburgh and Newport, Vermont, as being points on the international boundary line", those points being the very points over which the applicable combination rates were constructed and from which the *American factors* to the Carolina destinations were lawfully published and legally applicable.

The final contention that the District Court erred when it held that the rates applicable from the Canadian mines to East Alburgh and Newport, Vt., were not subject to the jurisdiction of the Commission apparently rests entirely on the fact that those rates were published in tariffs filed with the Interstate Commerce Commission. As has heretofore been argued, the mere act of the individual *Canadian* railroads in filing such tariff schedules with the Commission conferred no jurisdiction upon it which it did not otherwise have. The fact that the *Canadian factors* were proportional rates merely had the effect of making them inapplicable on any shipment which might be consigned for local delivery at East Alburgh or Newport, Vt.

The appellees respectfully submit that the appellants have presented no substantial question for decision by this Court, and that the judgment and order of the District Court should be affirmed.

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Certificate of Service

I, J. Edgar McDonald, attorney of record for the Central Vermont Railway, Inc., et al., appellees in these proceedings, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing motion on the several parties to this action, as follows:

1. On the appellants, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company; by mailing copies in duly addressed envelopes to its attorneys of record, with air mail postage prepaid, E. B. Ussery, 608 Security Federal Building, Columbia 1, South Carolina, and John D. Carbine, Mead Building, Rutland, Vt.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and H. Neil Garson, Associate General Coun. ., Interstate Commerce Commission, Washington 25, D. C.

3. On the United States of America, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record, J. Lee Rankin, Solicitor General, Robert A. Bicks, Assistant Attorney General, Richard A. Solomon, and John J. Voortman, Attorneys, United States Department of Justice, Washington 25, D. C., and Louis G. Whitcomb, United States Attorney for Vermont, Rutland, Vt.

This 1st day of September, 1960.

J. Edgar McDonald,
466 Lexington Avenue,
New York 17, N. Y.

APPENDIX A

United States District Court, District of Vermont

CIVIL ACTION No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Argued July 9, 1959. Finally submitted on briefs, November 1, 1959. Decided March 7, 1960

Before: WATERMAN, *Circuit Judge*, FOLEY and GIBSON, *District Judges*

HORACE H. POWERS, St. Albans, Vermont; (J. Raymond Hoover, Washington, D.C.; J. Edgar McDonald, New York City; William H. Parsons, Washington, D.C.; John F. Reilly, New York City, of counsel) for Plaintiffs.

Robert W. Ginnane, General Counsel; H. Neil Garson, Assoc. General Counsel, for Interstate Commerce Commission.

Robert A. Bicks, Acting Asst. Atty. General; John H. D. Wigger, Attorney, Department of Justice, Washington,

Appendix A

D.C.; Louis G. Whitcomb, U.S. Attorney for Vermont, Rutland, Vermont, for United States of America.

John D. Carbine, Rutland, Vermont; E. B. Ussery, Columbia, South Carolina (Harvey L. Golden, Joseph J. Lipton, Columbia, South Carolina, of counsel) for Interveners.

WATERMAN, *Circuit Judge*:

Ninety-one railroads[1] join in this action to enjoin and annul certain orders of the Interstate Commerce Commission,[2] entered pursuant to a decision of the full Commission reported at 303 ICC 743 (May 7, 1958). A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor in a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?

The rates in question pertain to the carriers of asbestos, a transportation originating in the Province of Quebec, Canada, and terminating at various points in North and South Carolina. The principal source of asbestos for United States manufacturers of asbestos products is a narrow belt of land in southern Quebec extending northeast and southwest approximately fifty miles west of the Maine border. Railroad appears to be the principal method of transporting this asbestos to its American

[1] Originally ninety-eight railroads joined as plaintiffs. However, on April 6, 1959, Judge Gibson issued an order permitting seven southern railroads to withdraw.

[2] Two orders are attacked. They are an Order dated May 7, 1958, that required the railroads to cease and desist from exacting rates held to be unreasonable and prejudicial in the Commission's decision of the same date; and an Order dated February 19, 1959, that amended the effective date of the May 7, 1958 order.

users. The asbestos area of southern Quebec is served by two Canadian railroads, the Canadian National and the Quebec Central. Asbestos intended for consignees in the southern-Atlantic states is carried by the Canadian lines to East Alburg, Vermont, and Newport, Vermont (points respectively 3 and 5 miles south of the international boundary) where the cars are turned over to American railroads in an "interchange" operation. Customs inspection on incoming railroad freight occurs at East Alburg and at Newport; and, to that extent at least, these towns may be regarded as border points.

The Canadian carriers have joined with American carriers in the publication of joint rates for the carriage of asbestos to points in the middle-Atlantic states and the middle-west. However, for the carriage of asbestos to the southern-Atlantic states the carriers concerned have not published joint rates but instead have published combination rates.[3] One factor of these combination rates is a proportional rate[4] pertaining to the transportation from the mines in Quebec to the Vermont points of interchange. The other factor is a local rate pertaining to the transportation from these points of interchange to the various southern destinations.

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[3] In railroad parlance a *joint* rate on a through route differs from a *combination* rate on a through route in that a joint rate is reached through an agreement of the participating carriers and each participating carrier is jointly and severally liable for the entire rate. See *Louisville and N. R.R. v. Sloss-Sheffield Co.*, 269 U.S. 217 (1925) at pp. 231-234.

[4] A *proportional* rate covers a portion of a through route and differs from a *local* rate between the same points in that the proportional rate applies only to transportation on the through route. See *Lewis-Simas-Jones Co. v. Southern Pacific R. Co.*, 283 U.S. 654, 663 (1931). Apparently the rates south of East Alburg and Newport to the Carolinas are merely local rates.

Appendix A

In 1951 Thermoid Company, Southern Division, a manufacturer of asbestos textile products, located in Charlotte, North Carolina, filed with the Commission a complaint alleging that the combination rates for the carriage of asbestos from mines located along the lines of the Quebec Central to Charlotte were unreasonable and were prejudicial in comparison with the joint rates given complainant's competitors in the middle-Atlantic states and the middle-west. As the complaint wound its way upward through the various levels of Commission adjudication, four additional complaints of a similar nature were consolidated with it.[5] In its decision the Commission accepted complainant's contentions. It held that the Quebec-Carolina rates were unreasonable and prejudicial and ordered reparation to the extent that the rates exceeded the rates for comparable distances charged complainants' competitors in the middle-Atlantic states and the middle-west.

We are, of course, without authority to consider the validity of the Commission's orders allowing reparations;[6] and plaintiffs here do not argue that the Commission's

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[5] The net effect of the consolidation was to increase the number of complainants to four so that the group then included manufacturers of asbestos products in Charlotte, Davidson and Marshville, North Carolina, and North Charleston, South Carolina and to expand the complaint so as to bring into question the rates from the mines along the Canadian National as well as those from the mines along the Quebec Central.

The four complainants in the proceedings before the Commission have intervened in this action under 28 U.S.C. § 2323.

[6] Under 28 U.S.C. § 2321 the jurisdiction of a three-judge district court extends to all orders of the Commission save those "* * * for the payment of money or the collection of fines, penalties and forfeitures * * *" Under 49 U.S.C. § 16(2) an action for the enforcement of a reparations order is to be brought by the complainant in one of several district courts or in a state court. In *United States v. ICC*, 337 U.S. 426 (1949) the Supreme Court indicated that the activities of a three-judge district court were to be carefully confined to those expressly provided for by Congress.

findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. Plaintiffs' argument before this court is confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas.

The Commission's power with respect to transportation wholly by railroad is set forth in Sections 1(1)(a) and 1(2) of the Interstate Commerce Act, 49 U.S.C. §§ 1(1)(a), and 1(2). These sections in pertinent part read as follows:

> Carriers subject to regulation
>
> (1) The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, • • •.
>
> • • • • •
>
> • • • from or to any place in the United States to or from a foreign country, *but only insofar as such transportation* or transmission *takes place within the United States.*
>
> Transportation subject to regulation
>
> (2) The provisions of this chapter shall also apply to such transportation of passengers and property • • • *but only insofar as such transportation* or transmission *takes place within the United States* • • •. [Italics supplied.]

Appendix A

As the Commission emphasized in its decision in the present case, it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into joint rates for international transportation. See *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654, 660 (1931); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520, 523 (1932); *International Nickel Co.* v. *Director General*, 66 ICC 627 (1922). However, it is equally well settled that the Commission does have power to pass upon the legality of existing joint rates on international transportation, and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation "only insofar as such transportation * * * takes place within the United States."[1] See *Black Horse Tobacco Co.* v. *Illinois Central*

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[1] Prior to February 28, 1920, Section 1(1) declared the Act to be applicable to carriers engaged in any of four types of international transportation: (1) from the United States to an adjacent foreign country; (2) from the United States through a foreign country to the United States; (3) from the United States to a foreign country when shipment is being carried from an originating point in the United States to a port of transshipment; (4) from a

R. Co., 17 ICC 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co.* v. *Director General*, 66 ICC 627 (1922). The Supreme Court has upheld the Commission's interpretation in two cases, *News Syndicate Co.* v. *New York Cent. R. Co.*, 275 U.S. 178 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654 (1931).

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foreign country to the United States when the shipment is being carried to a terminating point in the United States from a port of entry either in the United States or in an adjacent foreign country. In *Galveston, H. & S. A. R. Co.* v. *Woodbury*, 254 U.S. 357 (1920), a case decided under Section 1(1) as it existed prior to the 1920 Amendments, the Supreme Court held that transportation *from* an adjacent foreign country to the United States was within the Commission's jurisdiction under the provisions relating to the transportation from the United States to an adjacent foreign country. On February 28, 1920 (Section 400 of the Transportation Act of 1920, 41 Stat. 474) Section 1(1) was amended to apply to transportation: (1) from the United States through a foreign country to the United States, and (2) from or to the United States to or from a foreign country; but only insofar as these two types of international transportation take place within the United States. Section 1(2) quoted in the opinion, was a new section added by the 1920 Act.

There is language in *News Syndicate*, *supra*, at 186-87, and *Lewis-Simas-Jones*, *supra*, at. 663, which might be construed as indicating that the Commission would be without jurisdiction over the joint rate if the American carrier had also published a rate for the American portion of the transportation. The Commission, however, has subsequently held that it has jurisdiction ove joint rates irrespective of whatever additional rates may be filed. *Carstens Packing Co.* v. *Great Northern R. Co.*, 264 ICC 164 (1945); see also *Cyanamid and Cyanide from Niagara Falls, Ont.*, 155 ICC 488 (1929); *Publication of Rates between United States and Canada*, 147 ICC 778 (1928).

The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. The Canadian carriers published proportional rates to East Alburg, Vermont, and Newport, Vermont, the interchange points; and the American carriers published local rates for the remainder of the transportation.[9] The Commission does not dispute plaintiffs' statement that there are no facilities for interchange available between the international boundary and East Alburg and Newport. Nor does the Commission dispute that, as to shipments under the assailed combination rates, the Canadian carriers operate within the United States only for the purpose of turning over the asbestos to American carriers.[10] In its decision the Commission made no findings that the local rates south of the interchange points were unreasonable or prejudicial. The Commission, nevertheless, held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred within the United States.[10] The Commission stated its position in the following words:

> "The contentions of the defendants are based on the assumption that since Newport and East Alburgh

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[9] Because the Canadian rate is a proportional rate, it does not apply to any shipments to American consignees at points between the international boundary line and the interchange points, nor does it apply to shipments to be delivered by Canadian carriers to consignees located at the interchange points.

[10] As to those shipments where the interchange occurred at St. Johns, Quebec, the Commission held that the Canadian carrier was not liable for reparation. Apparently, however, the American carriers were liable for reparation even as to these shipments.

are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. [The Commission's reference is to publication of rates to and from the international boundary.] The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to those points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transporation takes place within the United States."

First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada."[1] It is now settled that the Commission need not make this distinction if the international transportation is conducted

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[1] In its decision in the present case the Commission states, at p. 754, that its jurisdiction here exists "regardless of the manner of rate publication." We gather this to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

on the basis of a joint rate because the American carriers have elected to become jointly and severally liable for the entire transportation charge, and because a contrary rule would force the Commission to rely upon the unpublished and possibly unverifiable divisions of the joint rate between the American carrier and the foreign carrier. This is not the situation where the American carrier and the foreign carrier each publish rates to and from a border point where interchange occurs. In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase "but only insofar as such transportation takes place within the United States" will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country.

Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Third, the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holding support its present position. The Commission relied upon *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 ICC 139 (1934); *Newsprint Paper*

[12] See note 10, *supra*.

to Detroit, 161 ICC 63 (1930); *Simpson Co.* v. *Grand Trunk W. R. Co.*, 129 ICC 430 (1927); *Larrowe Milling Co.* v. *Chatham W. & L. E. R. Co.*, 52 ICC 145 (1919); *Iron and Steel Wire, Buffalo, N. Y. to Kitchener Ont.*, 294 ICC 515 (1955); and to a lesser extent upon *Control of Hereford Ry. Co.*, 99 ICC 7 (1925) and *Status of Napierville Junction R. Co.*, 266 ICC 471 (1946). In *Fruit Importers, Newsprint to Detroit, Simpson Co.*, and *Wire, Buffalo to Kitchener*, the assailed rates were joint rates over which the Commission's jurisdiction is conceded. In *Larrowe Milling* the shipper assailed carload minima concurred in by both the Canadian and American carriers, thus presenting a situation analogous to a joint rate. In *Control of Hereford Ry. Co.*, a case involving the application of an American carrier to acquire control of a line 52.85 miles in length of which all but 0.67 miles were in Canada, and to abandon operations along this line, the Commission held it had authority to approve the acquisition under Section 5(a) but that its abandonment jurisdiction extended only to the trackage within the United States. In *Napierville Junction* the Commission held that a Canadian line whose trackage ended at the international boundary was not subject to the provisions of the Act even though its crews and equipment did conduct some operations on the one mile of track in the United States between the border and Rouses Point, N.Y. These last two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case.

Not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination international rate.[13] In *Albee*

Appendix A

Fruit Co. v. *Atlantic Coast Line R. Co.*, 293 ICC 785, Montreal consignees of fresh fruit from the Florida area filed complaints as to the combination rates made over Rouses Point, N.Y. In limiting its jurisdiction the Commission stated: "The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." *Hoffman-Taff, Inc.* v. *St. Louis S. F. R. Co.*, 279 ICC 710, 712 (1950) involved rates on shipments of aqua ammoniac from originating points in Canada to Springfield, Missouri. The rates were combination rates made over Detroit and Port Huron, and apparently the complaint attacked only the Canadian por-

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[13] *Watab Paper Co.* v. *Canadian National R. Co.*, 152 ICC 265 (1929) appears to be the single exception to the above statement. Watab involved shipments of pulpwood from Manitoba points of origin approximately thirty miles north of the border to a consignee in central Minnesota. After reaching the interchange point of Warroad, Minnesota, approximately six miles south of the border, the shipments were misrouted so as not to travel along the least expensive routing. In computing damages the Commission held that the factor from the Manitoba points of origin to Warroad was unreasonable. Jurisdiction to make such a holding was premised upon a Section 4 violation resulting from the fact that the rates from the Manitoba points of origin to Warroad were greater than the rate from the points of origin to International Falls, Minnesota, a point approximately seventy-five miles east of Warroad and a point which shipments from the points of origin could reach only by routing through Warroad. However, the Commission recognized that these circumstances were most unusual, stating at p. 268: "Where the rate from a point in Canada to a destination in the United States is *based on a combination of the rates to and from a border point within the United States, our jurisdiction ordinarily extends only to the rate within the United States.*" [Italics supplied.]

tion of the rates. The Commission stated: "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, which for all practical purposes are international border points, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction." In *E. J. Stanton* v. *Atchison T. & S. F. R. Co.*, 258 ICC 315 (1944) the Commission, after holding the American factors to be reasonable, refused to pass upon the Canadian factors of combination rates on the shipment of lumber from Los Angeles to the Maritime Provinces made over Port Huron, Detroit, Buffalo, and Rouses Point. For cases of similar import see *Dow Chemical Co.* v. *Alton & S. R. Co.*, 284 ICC 365 (1952); *Crelinsten* v. *Railway Express*, 201 ICC 283 (1934); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520 (1932). In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395-97 (1956); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 351-52 (1941).

It is contended that support for the Commission's present interpretation may be found in *Great Northern R. Co.* v. *Sullivan*, 294 U.S. 458 (1935). The *Sullivan* case involved the complaint of a North Dakota consignee of lignite mined in Alberta, Canada. The shipments moved on a combination

rate made over an international-border point located within the United States. The Commission awarded reparations upon a finding that the American factor was unreasonable. The Supreme Court reversed, holding that an award of reparations was improper without a finding that the entire rate, i.e., the sum of the American and Canadian factors, was excessive. Thus it is argued that *Sullivan* equated combination international rates with joint international rates for purposes of the Commission's jurisdiction. We believe that a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury. As we read the case the Court held that a complainant seeking reparations by attacking the American factor of a combination international rate must not only demonstrate the unreasonableness of the factor over which the Commission has jurisdiction but also the unreasonableness of the sum of the combined rates.

Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points. This argument is unpersuasive. The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers. If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 ICC 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 ICC 575 (1926). We merely hold that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United

States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate.

The orders described in note 2, *supra*, are annulled and set aside, and the cause is remanded for further proceedings in conformity with this opinion.

STERRY R. WATERMAN
U.S. Circuit Judge.

I concur:

JAMES T. FOLEY
U.S. District Judge.

I concur:

ERNEST W. GIBSON
U.S. District Judge.

APPENDIX B

28224

INTERSTATE COMMERCE COMMISSION

No. 30846 [1]

THERMOID COMPANY, SOUTHERN DIVISION v. BALTIMORE & OHIO RAILROAD COMPANY ET AL.

Decided May 7, 1958

1. Rates on crude asbestos and asbestos fiber from Danville, St. Malachie, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Quebec, Canada, to Charlotte, Davidson, and Marshville, N. C., and North Charleston, S. C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and for the future found to be unduly prejudicial. Reparation awarded, and defendants required to remove the unlawfulness found to exist.
2. Commission found without jurisdiction to prescribe just and reasonable joint through international rates for the future. Prior findings, 288 I.C.C. 795, modified.

Appearances as shown in prior report, and:

E. B. Ussery, Harvey L. Golden, and *H. V. Fleming* for complainants.

J. Edgar McDonald, R. C. Gill, Donal L. Turkal, James L. Tapley, and *J. Raymond Hoover* for defendants.

REPORT [2] OF THE COMMISSION

BY THE COMMISSION:

Exceptions were filed by the defendants to the report proposed by the examiner, the complainants replied, and

[1] This report embraces also No. 31683, Raybestos-Manhattan, Inc., General Asbestos & Rubber Division *v.* Baltimore & Ohio Railroad Company et al.; No. 31684, Thermoid Company, Southern Division *v.* Same; No. 31685, Union Asbestos & Rubber Company *v.* Same; and No. 31686, Carolina Asbestos Company *v.* Same.

[2] On further hearing in No. 30846.

the issues were orally argued before us. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings on conclusions have been considered and found not justified.

In the title proceeding, the complainant, a corporation engaged at Charlotte, N. C., in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed on July 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte were and are unjust, unreasonable, and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

In the prior report in that proceeding, 288 I. C. C. 793, division 3 found that the assailed rates had not been shown to have been or to be unjust or unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceeding reopened for oral argument and reconsideration. Thereafter, upon petition of the complainant, the proceeding was reopened for further hearing, which was held with the embraced proceedings on a consolidated record.

In No. 31684, the same complainant, by complaint filed on December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and

unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of complainant's competitors located in those territories. We are asked to prescribe lawful rates for the future.

In No. 31683, by complaint filed on December 6, 1954, and in Nos. 31685 and 31686, by complaints filed on December 13, 1954, the complainant corporations, which likewise are engaged in the manufacture, sale, and distribution of asbestos textile products, at North Charlston, S. C., and Marshville and Davidson, N. C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Coloraine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada, to North Charleston, Marshville, and Davidson were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is engaged also in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are unlawful in like respects. These complainants ask us to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

The most important variety of asbestos commercially, of which there are several, is chrysotile, which constitutes about 95 percent of world production. Domestic production of asbestos is negligible, and American manufacturers are dependent upon foreign supplies. The most important

commercial production of asbestos of the chrysotile variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide between Danville and East Broughton, and embraces most of the origin points here concerned. Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke to Valley Junction, Quebec, Canada, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, Quebec, and St. Malachie is on the lines of the same carrier extending eastward from Diamond, Quebec, Canada. There is no record of any movement from St. Joseph, and that point will not be further considered.

On the basis of use, asbestos falls into two principal classes; namely, spinning and nonspinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Nonspinning fibers consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

The rates[3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste, and asbestos refuse and shorts. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for rate-

[3] Rates are stated in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

making purposes, and Thetford Mines and Danville will hereinafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory, and points in western territory adjacent thereto, the defendants maintain joint through international commodity rates. The rates from Danville are substantially lower than those from Thetford Mines, although the distances do not vary greatly. To southern destinations, however, no joint through rates are maintained, and the complainants are required to pay charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of a joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore to the considered destinations, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates apply on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,[4] where it connects with the

[4] By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific Railway Company. See *Canadian Pacific Ry. Co. Lease*, 105 I.C.C. 575, 576.

Canadian Pacific. These are the only rail carriers serving Newport. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Danville on shipments routed to Marshville through Rouses Point, N. Y., another customs port of entry located about 0.5 mile from the international boundary, at which the shipments are interchanged by the Canadian National with The Delaware and Hudson Railroad Corporation. Until about November 1955, shipments routed from Danville through East Alburgh, and charged at that rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, Canada, for operating convenience, and on such shipments no transportation within the United States was performed by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, are 33 cents, minimum 40,000 pounds, on crude asbestos; 28 cents, minimum 40,000 pounds, and 25 cents, minimum 80,000 pounds, on asbestos fiber, and 14 cents, minimum 60,000 pounds, and 13 cents minimum 80,000 pounds, on asbestos refuse and shorts. On asbestos waste from Thetford Mines to Newport, the proportional rates are 20 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds. On asbestos waste from Danville to Baltimore, the joint through rates are 53 cents, minimum 60,000 pounds, and 48 cents, minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35[8], minimum 50,000 pounds, asbestos fiber is rated class 35, minimum 30,000 pounds, asbestos shorts and waste are rated class

[8] Class numbers represent percentages of the docket No. 28300 first-class rates.

27.5, minimum 40,000 pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport to the same respective destinations, the class 35 rates are $1.21, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville, apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth-class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-rate routing. Because of lesser increases imposed on commodity rates than on class rates, and the adjustment of class-rate scales under our order in docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth-section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are

manufactured by concerns with plants at Ambler, Pa., Manville, N. J., North Brookfield, Mass., Chicago, Ill., Meredith, N. H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cincinnati, Ohio, Rutherford, N. J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of 0.1 to 0.25 cent per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint through international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents, and later 10 cents, over the Sherbrooke rates. In September 1954, after a few rates on asbestos fiber had been established with an 80,000-pound minimum to a limited number of points, similar rates were published to numerous destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the complainants do not have the advantage of such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds.

The table in the appendix hereto compares representative applicable joint through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston. It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. As-

bestos producers on the Quebec Central, on shipments to points in official territory, absorb these rates differences, so that for all practical purposes receivers in that territory receive the benefit of the Canadian National rates. The complainants raise no issue concerning these rate differences as such, but ask that, if relief is afforded them, similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distance. For example, the rates on asbestos fiber from Danville to Ogdensburg, N. Y., 209 miles, and to Winchester, Va., 700 miles, are the same as the rates to Ambler and Manville, 68 cents, minimum 40,000 pounds and 61 cents, minimum 80,000 pounds, and the same rates apply to practically all points in trunkline territory from New York, N. Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thetford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1,024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1,026 miles, and to Hanibal, Mo., 1,149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08, minimum 60,000 pounds, and $1.07, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler

and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from Thetford Mines, the combination rates to Davidson are $1.14, minimum 60,000 pounds, and $1.12, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago, and 67 cents and 60 cents to St. Louis.

Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the docket No. 15879 class rates formerly prescribed for application within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official-territory points with the class rates and with combination rates constructed as are the rates to the complainants' destinations. For example, on crude asbestos from Thetford Mines to Ambler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate $1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

Asbestos is produced at Matheson, Ontario, and Vancouver, British Columbia, Canada. The rates on crude asbestos and asbestos fiber from Matheson to Chicago and

St. Louis are the same as those from Danville, for comparable distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the considered Carolina destinations, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana points; $1.01 to group D embracing Chicago; and 93 cents to group E-4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destirations, the rate to group K was reduced to $1.38. This rate was likewise made applicable to group A points, and the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson, Calif., for distances approximately 2.5 times those to the Carolina destinations, on asbestos fiber are $1.72 and $1.89, minimum 60,000 pounds, and $1.28 and $1.45, minimum 80,000 pounds; on asbestos waste, $1.13 and $1.27, minimum 80,000 pounds; and on asbestos refuse and shorts, $1.13 and $1.22, minimum 80,000 pounds.

The complainants have lost ground in recent years in their efforts to compete in the sale of asbestos textile products, particularly since the readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000 pounds. The proportion of the industrywide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first 3 months of 1955. In 1949 this complaint marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 that percentage dropped to 80.2. Raybestos-Manhattan, Inc., experienced a

decline in its proportion of total industry production from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952, the production of asbestos textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production. By 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has generally maintained its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official-territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles has been confined to North Carolina and South Carolina by reason of the competition from official-territory producers, and even there the competition is keen.

In April 1949, the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte, but the proposal was disapproved by the other lines. The defendants show that traditionally rates from Canadian origins to points in the South are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction in these proceedings only over the rate factors applicable

southbound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the South, with which they compare favorably. They contend, also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian carriers, over their lines from border points in Michigan, can effect delivery without participation of United States carriers. They admit, however, that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, particularly upon the establishment of the 80,000-pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500 to $1,500 per ton, milled asbestos spinning fibers at $300 to $525 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75 to $80 a ton, and assert that, in their view, the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories*, 299 I. C. C. 375, and were there found not shown to be just and reasonable, and ordered canceled. The defendants show also, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of the shipments to the Carolina

destinations are of spinning grades, that the reverse is true in official and western territories, and that there are few, if any, shipments of spinning fibers from these origins to points west of Akron, Ohio. Based on the latter circumstances, it was indicated at the hearing that a revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor-carrier competition, but the record is clear that the present rate structure was effected long before motor competition was a factor.

The complainants contend that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the prescription of joint through rates from the Caandian origins to their destinations reasonably related to the rate structure maintained to official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.

Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear

alternative with respect to their participation in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U. S. 179; *Buckerfield's* v. *Atchison, T. & S. F. Ry. Co.*, 280 I. C. C. 15. We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.

The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary. In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, 143, the defendants challenged our jurisdiction to pass upon the reasonableness of joint through rates to

Canada because they had published just and reasonable rates to Rouses Point, regarded generally as a Canadian border point. Division 4 pointed out, however, that the rates to Rouses Point were local rates and that if, as the defendants contended, they were intended to apply to the Canadian border, they should have been so published in clear and unequivocal terms. In *Newsprint Paper to Detroit*, 161 I.C.C. 637, division 5 stated, at page 639:

> It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transporation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was in violation of section 6 of the act. We have under the circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom.

In *Charles S. Simpson Co.* v. *Grand Trunk W. Ry. Co.*, 129 I.C.C. 430, division 4 considered the reasonableness of refrigeration charges from Port Huron, Mich., an interchange point between the Grand Trunk Western and the Canadian National, to Toronto, Ontario, and Montreal, Quebec, Canada, and found them not unreasonable. In *Larrowe Milling Co.* v. *Chatham, W. & L.E.R. Co.*, 52 I.C.C. 145, which involved the charges on beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey, reparation was awarded against the carriers that performed the haul within the United States, although it was stated that the haul performed by the Michigan Central Railroad Company to Suspension Bridge, N. Y., was almost wholly without the boundaries of the United States. In *Iron or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 I.C.C. 515, the respondents contended that this Commission should not take jurisdiction over rates which included hauls of only 6.04 miles within the United States

to the Canadian border, the distance therefrom to the Canadian destination approximating 123 miles. The contention was rejected by division 3.

In other proceedings not concerned with the matter of rates, we have noted jurisdiction over that portion of a rail line extending south of the Canadian border even though the haul within the United States was small as compared with the total mileage. In *Hereford Ry. Co. Control*, 99 I.C.C. 7, division 4 authorized the Maine Central Railroad Company to acquire control of the Hereford Railway Company, a Canadian carrier 52.85 miles long, and to abandon that portion of the line extending 0.67 mile into Coos County, N. H. In *Status of Napierville Junction Ry. Co.*, 266 I.C.C. 471, it was found that the respondent was not a common carrier subject to part I of the act since its operations stopped at the Canadian-United States boundary, and the haul therefrom to Rouses Point, 1.1 miles, was performed by The Delaware and Hudson Railroad Corporation.

The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.

As above indicated, the defendants maintain joint through commodity rates from the considered Canadian origins to numerous points in official territory. The rates shown in the appendix hereto to Ambler apply to 26 destinations on crude asbestos for distances ranging from 377 to 678 miles, and averaging 513 miles, from Danville, and from 455 to 719 miles, averaging 553 miles, from Thetford Mines; and on asbestos fiber to over 150 destinations for distances ranging from 209 to 710 miles, averaging 493 miles, from

Danville, and from 314 to 788 miles, averaging 545 miles, from Thetford Mines. The range in distances on asbestos refuse and shorts is about the same as on asbestos fiber. Thus, it appears that Ambler, where asbestos products are manufactured (529 miles from Danville and 570 miles from Thetford Mines), is a representative destination in these groupings.

From Thetford Mines to Ambler, the commodity rates of 97 cents, minimum 40,000 pounds, on crude asbestos, 86 cents, minimum 40,000 pounds, on asbestos fiber, 58 cents, minimum 60,000 pounds, on refuse and shorts, and 62 cents, minimum 60,000 pounds, on waste are about 86, 80, 76, and 81 percent, respectively, of what the rates would be if constructed on a combination basis in a manner similar to that used in constructing the rates to the considered Carolina destinations. The 80,000-pound commodity rates to Ambler on asbestos fiber, refuse and shorts, and waste are approximately 90 percent of those subject to the lower minimum weights. The rates herein found just and reasonable to Carolina destinations are constructed on a substantially similar basis. For example, the rate of $1.33 found just and reasonable on crude asbestos, minimum 40,000 pounds, from Thetford Mines to Charlotte is about 86 percent of the combination rate of $1.54. Moreover, the rates herein found just and reasonable to the Carolina destinations are substantially higher, distance considered, than the rates to numerous destinations in official territory. See, for example, the rates shown in the appendix hereto of $1.14, minimum 40,000 pounds, and $1.04, minimum 80,000 pounds, on asbestos fiber from Thetford Mines to Kirkwood (St. Louis), Mo., 1,198 miles, as compared with respective rates of $1.20 and $1.10 found reasonable herein on the same commodity from the same origin to Charlotte, 1,083 miles.

It is clear that the complainants' competitors at Ambler and other destinations in official territory are being un-

duly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. The rates from the Quebec Central mines generally are on a higher level to points in official territory than those from the Canadian National mines, and appear to represent reasonable maxima. Equitable treatment of the complainants would require, however, that they be accorded rate levels from the Canadian National mines which are relatively the same as those available to receivers in official territory in order to remove the undue preference and prejudice found to exist. As stated, we have no authority to prescribe for the future joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on international traffic to the extent that the transportation takes place within the United States.

We find that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, and Warwick, rates of $1.33, minimum 40,000 pounds, on crude asbestos, and $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, on asbestos fiber to Charlotte; and from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick of $1.33 to Davidson and Marshville and $1.41 to North Charleston on crude asbestos, minimum 40,000 pounds, of $1.20 minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, to Davidson and Marshville, and $1.27, minimum 40,000 pounds, and $1.16, minimum 80,000 pounds, to North Charleston on asbestos fiber; and to Davidson of 82 cents, minimum 60,000 pounds, and 74 cents, minimum 80,000

pounds, on asbestos refuse and shorts, and of 88 cents, minimum 60,000 pounds, and 80 cents, minimum 80,000 pounds, on asbestos waste.

We further find that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, and destinations taking the same rates, by the following amounts: On crude asbestos 36 cents, minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 44 cents, minimum 40,000 pounds, from the latter origins to North Charleston; on asbestos fiber, 34 cents, minimum 40,000 pounds, and 31 cents, minimum 80,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 41 cents, minimum 40,000 pounds, and 37 cents, minimum 80,000 pounds, from the latter origins to North Charleston; and to Davidson from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, 24 cents, minimum 60,000 pounds, and 21 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and 21 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds, on asbestos waste.

We further find that on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will

SEP 22 1960
JAMES R. BROWNING, Clerk

No. 257

Supreme Court of the United States

October Term, 1960

H. K. PORTER COMPANY, INC., *ET AL.*, APPELLANTS,

vs.

CENTRAL VERMONT RAILWAY, INC., *ET AL.*,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF H. K. PORTER COMPANY, INC., ET AL., APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM

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be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

We further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, were damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases herein found to have been just and reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In instances where shipments from Danville and Warwick were interchanged by the Canadian National at St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp.* v. *Holton I.-U. R. Co.*, 164 I.C.C. 505, 510.

To all of the rates resulting from the findings herein may be added the applicable general increases authorized on and subsequent to March 12, 1951.

An order will be entered vacating the prior order in No. 30846, and requiring the removal of the undue preference and prejudice found to exist.

CHAIRMAN FREAS dissents.

COMMISSIONERS MITCHELL and GOFF did not participate in the disposition of this proceeding.

Appendix B

APPENDIX

To—	Crude asbestos				Asbestos fiber			
	From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada		From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada	
	Short-line distance	Rates,[1] minimum 40,000 pounds	Short-line distance	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds	Rates,[1] minimum 40,000 pounds	Rates, minimum 80,000 pounds
	Miles	*Cents*	*Miles*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Manville, N. J.	480	68	521	97	68	61	86	77
Ambler, Pa.	529	68	570	97	68	61	86	77
Chicago, Ill.	907	103	987	132	85	77	101	91
Kirkwood (St. Louis), Mo.	1,118	.....	1,198	.....	97	87	114	102
Richmond, Va.	782	.....	823	.....	100	90	118	106
Charlotte, N. C.	1,042	150	1,072	154	134	131	134	131
Davidson, N. C.	1,631	149	1,109	152	134	131	134	131
Marshville, N. C.	1,068	152	1,083	156	136	133	136	133
North Charleston, S. C.	1,175	159	1,216	163	154	151	158	155

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 50,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 50,000 pounds beyond.

Appendix B

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 7th day of May, A.D. 1958

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

These proceedings being at issue upon complaints and answers on file, and having been duly heard and submitted

by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and the prior report in No. 30846, 288 I.C.C. 793, are hereby referred to and made a part hereof; and the Commission having found in the report of even date that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, in carloads, from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, Quebec, Canada, to certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants and unduly preferential of the complainants' competitors to the extent indicated in said report of even date:

It is ordered, That the defendants named in the complaints, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue prejudice and preference referred to in the preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

And it is further ordered, That the order of May 25, 1953, in No. 30846, be, and it is hereby, vacated and set aside, and that this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL]

HAROLD D. McCOY,
Secretary.

Appendix B

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 11th day of March, A.D., 1959

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

It appearing, That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided May 2,

1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

It further appearing, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

It is ordered, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

It is further ordered, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

And it is further ordered, That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the findings of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

[SEAL]

HAROLD D. McCOY,
Secretary.

APPENDIX C

Statutes Involved.

Section 1(1) (a) and (2) (49 U. S. C. § 1(1)(a) and (2)).

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment;

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

* * * *

Section 1(5) (49 U.S.C. § 1(5)).

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Appendix C.

Section 3(1) (49 U.S.C. § 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * *

APPENDIX D

Cases in which the Commission declined to take jurisdiction over the foreign factor of combination rates made over border points within the United States.

Carey Mfg. Co. v. *G. T. W. Ry. Co.* (1915), 36 I.C.C. 203, 206.

Big Basin Lumber Co. v. *S. P. Co.* (1916), 37 I.C.C. 730, 737.

Arizona Lumber & Timber Co. v. *A.E. R.R. Co.* (1925), 96 I.C.C. 203, 206.

Thannhauser & Co. v. *Southern Pac. Co.* (1929), 159 I.C.C. 747.

Fruit Importers v. *Atlantic Coast Line R. Co.* (1932), 188 I.C.C. 520, 524.

M. Crelinsten & Sons v. *Railway Express Agency, Inc.* (1934), 201 I.C.C. 284, 286.

E. J. Stanton & Son v. *Atchison, T. & S. F. Ry. Co.* (1944), 258 I.C.C. 315, 318.

Hoffman-Taff, Inc. v. *St. Louis-S. F. Ry. Co.* (1950), 279 I.C.C. 710, 712.

Dow Chemical Co. v. *Alton & S. R.* (1952), 284 I.C.C. 365, 370.

Elliott Packing Co. v. *Duluth, W. & P. Ry. Co.* (1954), 292 I.C.C. 12, 13.

Albee Fruit Co. v. *Atlantic Cost Line R. Co.* (1955), 293 I.C.C. 785, 787.

Endicott-Johnson Corp. v. *Akron, C. & Y. R. Co.* (1957), 300 I.C.C. 373, 384.

Conrad Fafard, Inc. v. *Canadian National Rys.* (1957), 302 I.C.C. 163.

****Yellow Jacket Boat Co., Inc.* v. *Atchison, T. & S. F. Ry. Co.* (1958), 302 I.C.C. 657; 305 I.C.C. 113.

*****United States Overseas Airlines, Inc.* v. *P.-R. S. Lines* (1960), 309 I.C.C. 411.

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*Highgate Springs, Vt., the United States port of exit, was 3.5 miles south of the international boundary.

****** Decided subsequent to the decision of the commission in the instant case.

EXHIBIT E

Joint rate cases in which the Commission declined to take jurisdiction over foreign railroads and the transportation they performed on traffic interchanged with American railroads at border points within the United States.

Black Horse Tobacco Co. v. I. C. R. R. Co. (1910), 17 I.C.C. Rep. 588.

*International Paper Co. v. D. & H. Co. (1915), 33 I.C.C. 270.

Fairmont Creamery Co. v. Adams Express Co. (1917), 43 I.C.C. 724.

Booth Fisheries Co. v. American Express Co. (1917), 45 I.C.C. 363.

International Nickel Co. v. Director General (1922), 66 I.C.C. 627.

Spanish River Pulp & Paper Mills v. A. & W. Ry. Co., 113 I.C.C. 343; 126 I.C.C. 251.

**Ontario Paper Co. v. C. N. Rys. (1924), 95 I.C.C. 66; 102 I.C.C. 365.

Cyanamid and Cyanide From Niagara Falls (1929), 151 I.C.C. 207; 155 I.C.C. 488.

†Lewis-Simas-Jones Co. v. S. P. Co., 102 I.C.C. 245.

Celon Co. v. Canadian Pac. Ry. Co. (1940), 238 I.C.C. 407.

Dallas Produce Co. v. Atchison, T. & S. F. Ry. Co. (1950), 278 I.C.C. 746.

Chas. H. Lilly Co. v. Great Northern Ry. Co. (1956), 298 I.C.C. 407.

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* Massena Springs, N. Y., one of the Canadian-American railroad interchange points, was "about 20 miles from the boundary line via the route of movement."

**Ultimately considered by this Court in *News Syndicate Co. v. N. Y. C. R. R.* (1927), 275 U. S. 179.

†Ultimately considered by this Court in *Lewis, Etc. Co. v. Southern Pac. Co.*, 283 U. S. 654.

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No. 257

Supreme Court of the United States

October Term, 1960

H. K. PORTER COMPANY, INC., *ET AL.*, APPELLANTS,

versus

CENTRAL VERMONT RAILWAY, INC., *ET AL.*,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF OF H. K. PORTER COMPANY, INC., ET AL., APPELLANTS, IN OPPOSITION TO MOTION TO AFFIRM

STATEMENT

Pursuant to Rule 16, Paragraph 3, of the Revised Rules of this Court, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, Appellants, file this brief in opposition to the Motion to Affirm filed by the Appellees.

ARGUMENT

The Appellees throughout their Motion to Affirm maintain that the Interstate Commerce Commission lacked jurisdiction to decide the issues presented by the complaints, duly filed before that body, because the rates they assessed on asbestos and related commodities from the mines in Quebec to southern destinations were made on a combination basis. They contend that the Commission has jurisdiction only over international joint rates, which they might voluntarily establish, and argue that in the establishment of such rates they participated in the making or construction of the level of the rates through express agreement with all carriers participating in the movement of traffic under the rates. They argue, however, that in the case of combination rates no such agreement between the carriers exists. It is contended that each participating carrier is responsible only for the rates actually published and filed by them with the Interstate Commerce Commission. The Appellees ignore entirely the doctrine of **implied agreement.**

The facts and circumstances of the instant case show beyond doubt that there was and is an **implied agreement or arrangement** between the participating carriers involved to transport asbestos and related products from Quebec origins to southern destinations on through rates which in law cannot be distinguished legally from single factor joint rates. While Appellants in their Jurisdictional Statement dealt with the legal nature of the combination rates and showed that the rates assessed the "Southern Consumers" from the standpoint of the jurisdiction of the Commission could not be legally distinguished from the single factor joint rates assessed their competitors in official territory, it is deemed desirable in this Reply to call the Court's attention to certain pronouncements made by this Court in connection with similar factual rate situations.

In every substantial sense through rates constructed out of a proportional rate and a local rate and applied on traffic moving under through bills of lading over through routes are on the same level as single factor joint through rates. In *Kansas City S. R. Co. v. C. H. Albers Com. Co.*, 223 U. S. 573 (1911), this Court said:

> Section 6 of the interstate commerce act, as it existed at the time, laid upon every carrier subject to the provisions of the act the duty of filing with the Commission and publishing schedules of the rates to be charged for the transportation of property over its road, provided for changing and superseding such rates by new schedules so filed and published, and made it unlawful for such a carrier to depart from any rate so established and in force at the time. That section also required connecting carriers, agreeing upon joint through rates, to file schedules thereof with the Commission, made similar provision for changing and superseding rates so established, and likewise prohibited any deviation from an established joint rate while remaining in force. Other sections contained provisions against unreasonable rates, unjust discriminations, undue preferences, and the like. The chief purpose of the act was to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. **In every substantial sense local rates and joint through rates were placed on the same level.** Both required to be openly established and uniformly applied. True, the carriers were obliged to establish local rates, and were left free to agree upon joint through rates, or not, as they chose; but if they did agree thereon, the rates could become legally operative only by being established as prescribed in the act. The true effect of the

statute in this regard—we speak of the statute as it existed in 1901—is clearly stated in the opinion of the circuit court of appeals for the eighth circuit, in *Chicago, R. & Q. R. Co. v. United States*, 85 C. C. A. 194, 157 Fed. 830, 833, as follows:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, **each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged.** It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end is taken, they in effect adhere to the rates established, published, and filed by them as applying not only to local but to through traffic." (Emphasis supplied.)

Attention of the Court is called to the fact that in the instant case the initial carriers originating the asbestos traffic in the province of Quebec issued through bills of lading and collected the through transportation charges. It is certain that the Appellees operating in the United States between East Alburgh and Newport, Vermont, on the one hand, and southern destinations on the other hand, by their actions and conduct have impliedly asserted that the local rates published and assessed by them.

from the said points in Vermont to the southern destinations are component parts of through rates.

Appellees in their Motion to Affirm at page 22 state: "The decision in the *Sloss-Sheffield case* indicates that the rates there involved were joint rates" and leave the impression that such joint rates were single factor rates.

Appellees ignore entirely that in the *Sloss-Sheffield case*, 269 U. S. 217, this Court held that a through rate constructed out of proportionals could not be legally distinguished from a single factor joint rate. At pages 233 and 234 of 269 U. S. this Court said:

> The fact that the joint rate had been constructed out of existing proportional rates is not of legal significance. The rates complained of were not merely the aggregate of individual local or proportional rates customarily charged by the respective lines for the transportation included in the through routes. The rates in question were strictly joint through rates. Each through rate was complained of as a unit. Compare *Parsons v. Chicago & Northwestern Ry. Co.*, 167 U. S. 447, 455, 456, 17 S. Ct. 887, 42 L. Ed. 231. A single charge was made for the transportation from point of origin to point of destination.
>
> Nor does the fact that the connecting carriers may have been induced to enter into these agreements for joint through rates, because the Interstate Commerce Act had declared this to be the general duty of all carriers, prevent the agreement actually entered into from being the joint act of these carriers. Every local or individual rate is likewise established pursuant to a duty. Whether a rate be individual or joint the Commission may enforce performance if the duty to establish it is neglected. The liability in the case at bar arises out of the wrongful exaction from the shipper, not out of the unlawful receipt or unjust enrichment by the carrier. Every carrier who participates in the infliction of this wrong is liable in solido like every other tort-feasor. The tariff rate, although unlawful

because excessive, was as between shipper and carrier the only legal rate. Neither would have been at liberty to avail itself of more favorable rates for any part of the through carriage. Compare *Baltimore & Ohio Southwestern R. R. Co. v. Settle*, 260 U. S. 166, 171, 43 S. Ct. 28, 67 L. Ed. 189. The Louisville & Nashville, the initial carrier, exacted the excessive joint rates on behalf of itself and of all of the connecting carriers who with it were parties to the joint through rates.

It is respectfully submitted that the doctrine pronounced by this Court in the *Sloss-Sheffield case* is applicable in the instant case even though international traffic is involved. This is evidenced by the fact that this Court in *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, cited the *Sloss-Sheffield case* in support of its holding that it is the through transportation charge which concerns the shipper or user of transportation services and not the component parts of the through rates, and its further holding that the through transportation charges must be found unlawful before the Commission under the Act is authorized to make an award of damages.

Appellees took exception to Appellants' statement in their Jurisdictional Statement that should the Commission be deprived of jurisdiction in the instant case, all shippers in the United States would be at the mercy of the Appellees insofar as assessed transpotration charges are applied on international traffic. Appellees contend the Commission has jurisdiction only over one component part of the through transportation charge assessed the "Southern Consumers" and that the complaints should assail only the lawfulness of that part of the through rate applying from East Alburgh and Newport, Vermont, to the southern destinations. Attention of this Court is called to the fact that the complaints assail the lawfulness of the single factor joint rates from the Canadian origins to destinations

in official territory, and the through rates assessed "Southern Consumers"; By Appellees' method of election as to tariff publications they have made it impossible to compare rates assessed competitors in official territory from the international boundary with those assessed "Southern Consumers" from East Alburgh and Newport. Again it should be noted that under the holdings of this Court in the *Sullivan case* the Commission, if it is to award damages, must find that the through transportation charges are unreasonable.

Appellees in their Motion to Affirm and throughout the litigation before this Commission and the district court have ignored the fact that it is their participation in the assessment of unlawful through transportation charges which makes them liable for accounting. They do not have to account to anyone as to the method of tariff publication so long as such tariffs are constructed and filed in accordance with Section 6 of the Act. It will be noted that throughout the Appellees' Motion to Affirm it is continuously reiterated that combination rates are assessed the "Southern Consumers". They refrain from stating that a proportional rate is involved and that this proportional rate is an inherent part of a through rate, and that the local rates from the Vermont points are also inherent parts of the through rates. Appellees ignore the fact that the Canadian railroads issued the original bills of lading and collected the transportation charges for the benefit of all participating carriers performing the transportation service. Appellees ignore entirely the doctrine of **implied agreement** and try to escape their responsibility under the law by simply asserting that they elected to establish single factor rates on asbestos to points in official territory and thus conferred jurisdiction on the Commission to determine their lawfulness, whereas, they had, by their election, conferred no such jurisdiction on the Commission when

they participated in through rates made on a combination basis. From the above excerpts from this Court's decisions in the past and from the argument advanced in the Appellants' Jurisdictional Statement, it is obvious that the Appellees' contentions in the instant case are unsound.

As stated by the Appellees at page 18 of their Motion to Affirm "Either the Commission had jurisdiction to consider and dispose of the complaints before it or it did not." With this statement we agree. We have shown above, and in our Jurisdictional Statement previously filed, the mere fact that the through rates assessed the "Southern Consumers" were made on a combination basis over an interior point in the United States did not deprive the Commission of jurisdiction to determine the lawfulness of the through transportation charges upon proper complaint. The through rates assessed the "Southern Consumers" cannot be legally distinguished from the single factor joint rates assessed their competitors in official territory. The Commission specifically found that the Appellees had not complied with the Act and established rates from the international boundary line. Clearly the doctrine applied by this Court in *News Syndicate Co. v. N. Y. Central R. Co.*, 275 U. S. 179 applies in the instant case.

The Appellees also argue that the Commission is deprived of jurisdiction in the instant case because in some cases heretofore the Commission has refrained from exercising jurisdiction. The attention of the Court is called to the fact that in *Newsprint Paper to Detroit*, 161 I. C. C. 637, decided in 1930, the Commission exercised jurisdiction because the carriers operating in the United States had failed to establish and publish rates from the middle of the Detroit River, which is the international boundary line, to Detroit. It cannot be argued that the Commission has engaged in a uniform practice.

While the interpretation given to a statute by those charged with its application and enforcement is entitled to considerable weight, it is hardly conclusive. *County of Marin v. United States*, 356 U. S. 412, 420; *United States v. Missouri & Pacific R. Co.*, 278 U. S. 269, 280. In the *Missouri Pacific case*, cited, this Court held that "The rule does not apply in cases where the construction is not doubtful". The construction of the statute involved in the instant case certainly does not fall in the doubtful category for this Court has settled its interpretation in various decisions including among others, *Kansas City S. R. Co. v. C. H. Albers Com. Co., supra; Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. N. Y. Central R. Co., supra; Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co.*, 283 U. S. 654; *Great Northern Ry. Co. v. Sullivan, supra.*

The very most the Appellees can claim in this case is that the Commission has been inconsistent and with this the Court is not concerned. *Virginia Ry. Co. v. U. S.*, 272 U. S. 658. Even though the Commission in some instances has refrained from exercising jurisdiction, the Commission is not bound by the former error of its ways and neither is this Court. An administrative ruling is not so sacrosanct as to be beyond the correction of error; it need not perpetuate error. *American Chicle Co. v. United States*, 316 U. S. 450.

The district court held that consistent interpretation by the Commission ought not to be set aside without a strong showing to justify departure and cited in support thereof *United States v. Leslie Salt Co.*, 350 U. S. 383, and *F. T. C. v. Bunte Bros.*, 312 U. S. 349. These decisions of this Court do not support application of the principles therein enunciated to the Interstate Commerce Commission. This Court in the *Bunte Bros. case* said it was treacherous business to translate implications drawn from one statute

to a totally different statute. The *Bunte Bros. case* involved the Federal Trade Commission, not the Interstate Commerce Commission; however, it should be noted that in the *Bunte Bros. case* this Court said at page 352: "Authority actually granted by Congress of course cannot be evaporated for lack of administrative exercise".

As we have heretofore pointed out in our Jurisdictional Statement, previously filed, the final decision in this case will have a far-reaching impact on industry in the United States which must rely on raw materials from an adjacent foreign country. The district court erroneously atomized the through transportation charges assessed "Southern Consumers" and considered only the proportional rate from the Canadian origins to East Alburgh and Newport, Vermont. The district court thereby divided an indivisible entity which was and is the through transportation charge assessed and as this Court has on many occasions stated, it is this entity which must be considered.

It is respectfully submitted that under the circumstances of the instant case, as revealed by the Commission's decision and pleadings filed with this Court, that the Appellees in participating in through rates made on a combination basis to southern destinations have *impliedly agreed* with all participating carriers performing the transportation service to southern destinations that the through rates assessed and collected are in fact on the same level legally speaking with the single factor joint rates assessed competitors in official territory.

CONCLUSION

For the reasons stated above and those set forth in our Jurisdictional Statement previously filed, these Appellants submit that the questions presented by this appeal are so substantial as to warrant plenary consideration by this Court on the merits. The motion to affirm should be denied, probable jurisdiction should be noted, and the decision and judgment of the district court should be reversed and set aside.

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Dated at Columbia, S. C.,
September 20, 1960.

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JAMES R. BROWNING, Clerk

No. 257

Supreme Court of the United States

OCTOBER TERM, 1960

H. K. PORTER COMPANY, INC., ET AL., APPELLANTS,

versus

CENTRAL VERMONT RAILWAY, INC., ET AL.,
APPELLEES

BRIEF FOR H. K. PORTER COMPANY, INC.—THERMOID DIVISION—SUCCESSOR IN INTEREST TO THERMOID COMPANY—SOUTHERN DIVISION; RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION; UNION ASBESTOS AND RUBBER COMPANY; AND CAROLINA ASBESTOS COMPANY.

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No. 257

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BRIEF FOR H. K. PORTER COMPANY, INC.—THERMOID DIVISION—SUCCESSOR IN INTEREST TO THERMOID COMPANY—SOUTHERN DIVISION; RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION; UNION ASBESTOS AND RUBBER COMPANY; AND CAROLINA ASBESTOS COMPANY.

INTRODUCTION

This brief is filed for H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company. These appellants (sometimes hereinafter referred to as "Carolina Consumers"), all of which are located in North and South Carolina, were complainants before the Interstate Commerce Commission (hereinafter referred to as the Commission).

OPINIONS BELOW

The opinion of the District Court (R. 241-253) is reported at 182 F. Supp. 516. The report of the Interstate Commerce Commission (R. 60-79) is reported at 303 I. C. C. 743.

JURISDICTION

The judgment of the District Court was entered on March 7, 1960 (R. 241, 253). A motion for reconsideration, timely filed, was denied on March 26, 1960 (R. 260). Notice of Appeal was filed in the District Court on May 5, 1960 (R. 262). Probable jurisdiction was noted October 17, 1960 (R. 272). The jurisdiction of the Court upon appeal rests on 28 U. S. C. 1253 and 2101(b).

STATUTES INVOLVED

Sections 1(1)(a) and (2); 1(4), 1(5); 3(1); 6(1), 6(7); 8; 13(1); and 16(1) of the Interstate Commerce Act, 49 U. S. C. 1(1)(a) and (2), 1(4), 1(5); 3(1); 6(1), 6(7); 8; 13(1) and 16(1). Pertinent portions of these sections of the Interstate Commerce Act are reproduced in the Appendix, *infra*, pages 65-70.

QUESTIONS PRESENTED

1. Whether the District Court erred in failing to sustain the Commission's determination that acts by railroads operating within the United States in maintaining single factor joint rates applicable on asbestos and related commodities from points of Canadian origin in the province of Quebec to points in official territory, while maintaining through rates (made on a combination basis over an interior point in the United States) on a higher level for like service from the same Canadian origins to points in the Carolinas, were unduly prejudicial to shippers in the Carolinas and unduly preferential of competing shippers in offi-

cial territory, in violation of the Interstate Commerce Act (49 U. S. C. 3(1)).

2. Whether the District Court erred in holding that the Commission lacked power to determine the reasonableness and justness of through rates assessed on international shipments of asbestos and related commodities, moving over through routes on through bills of lading, from Canadian origins in the province of Quebec to points in southern territory in the Carolinas, for the purpose of determining damages under the provisions of the Interstate Commerce Act for a violation thereof, when the Commission found that rail carriers subject to its jurisdiction had failed to establish just and reasonable rates, for the service rendered, from the international boundary, as required by the Interstate Commerce Act (49 U. S. C. 1(5), 6(1) and (7)).

3. Whether the District Court erred in holding that the Commission did not have jurisdiction for any purpose over proportional rates, filed with the Commission by the Canadian carriers, applying on asbestos and related commodities from Canadian origins in the province of Quebec to East Alburgh and Newport, Vermont, duly restricted to apply only on shipments moving to destinations in the United States, for use by all participating carriers in the through transportation service rendered over through routes in constructing through transportation charges assessed receivers of asbestos and related commodities at points in the United States, where no through single factor joint rates were published in the same tariff.

STATEMENT

These are direct appeals from the final judgment of the District Court setting aside and annulling the report and order of the Commission dated May 7, 1958 (R. 60-81), as clarified by order of the Commission entered March 11, 1959[1] (R. 225-226). The pertinent facts may be stated as follows:

The proceedings before the Commission, which are under review in this appeal, were initiated by "Carolina Consumers" through complaints duly filed with the Commission under section 13(1) of the Interstate Commerce Act (49 U. S. C. 13(1)). The complaints allege that the single factor joint rates maintained by the defendant railroads from the Canadian mine origins to destinations in official territory for application on asbestos products were unduly prejudicial to "Carolina Consumers" and unduly preferential of consignees in official territory[2], in violation of the Interstate Commerce Act (49 U. S. C. 3(1)); and further, that the through transportation charges assessed "Carolina Consumers" were unduly prejudicial to them and unduly preferential of consignees in official territory in violation of the Act (49 U. S. C. 3(1)). The "Carolina Consumers" also alleged that the through transportation charges assessed them were unjust and unreasonable, in violation of the Act (49 U. S. C. 1) and prayed damages in the form of reparation as authorized by the Act (49 U. S. C. 8 and 16(1)).

After hearings before an Examiner, receipt of original briefs, rendition of the Examiner's proposed report and

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[1] The order of March 11, 1959, among other things dispelled any doubt that the method of adjusting rates to remove the unlawful discriminations found to exist was left to the option of the rail carriers. See *Texas & P. Ry Co. v. United States*, 289 U. S. 627, 650.

[2] Official territory, broadly speaking, lies east of the Mississippi River and north of the Potomac and Ohio Rivers. *Class Rate Investigation, 1939*, 262 I. C. C. 447, 457.

recommended order (R. 177), and oral argument, the Commission rendered its decision dated May 7, 1958 (R. 60). The Commission found that "Carolina Consumers'" competitors in official territory were being assessed through rates which unduly preferred them to the undue prejudice and disadvantage of "Carolina Consumers"; and that the through rates assessed the "Carolina Consumers" were unduly prejudicial to them and unduly preferential of their competitors in official territory; and further, that "Carolina Consumers" had been and were being assessed unjust and unreasonable through transportation charges on asbestos and they were directed to comply with Rule 1.100 of the **General Rules of Practice** relating to an award of damages for the violations of the Act found to exist.

The pertinent facts and circumstances which the Commission found in support of its decision may be stated as follows:

The "Carolina Consumers" are manufacturers of asbestos textile products and other products, such as asbestos shingles, at points located in the states of North Carolina and South Carolina. In the sale and marketing of these products throughout the United States they are in competition with similar manufacturers of asbestos textile products and other products, such as asbestos shingles, located in what is known as official territory. "The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there." (R. 66.)

The basic major raw materials utilized in the manufacture of asbestos textile products and asbestos shingles are crude asbestos, asbestos fiber generally, asbestos waste, and abestos refuse and shorts. These products are strategic materials and are obtained by manufacturers, both in the Carolinas and in official territory, from asbestos producing mines located in the province of Quebec, Canada.

Since the turn of the century, manufacturers located in official territory have been assessed through transportation charges from the Canadian mines based on single factor joint rates[3] filed with the Commission in due tariff form. The defendant railroads before the Commission, participating in the through transportation service from the producing mines in Canada to destinations in official territory, have never established and maintained rates applicable on asbestos traffic originating in Canada from the international boundary line to destinations in official territory.

"Carolina Consumers" have always been assessed through transportation charges constructed out of existing proportional rates, published and filed with the Commission by the Canadian carriers,[4] applying from the Canadian mines to East Alburgh and Newport, Vermont, and local rates of the remaining participating carriers applying from East Alburgh and Newport to Carolina destinations at which appellants' plants are located.[5] The defendant railroads, participating in the through transportation service to destinations in the Carolinas, have never established and maintained rates applicable from the international boundary line, for application on asbestos which originated in Canada, to destinations in the Carolinas.

The proportional rates[6] from the Canadian mines to East Alburgh and Newport, Vermont, are published in the same tariffs on file with the Commission which contain the

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[3] The Act does not authorize or forbid the making of joint through international rates. See *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654, 660, Note 1.

[4] Canadian National Railways and Quebec Central Railway Company.

[5] The through transportation charges on asbestos waste from Canadian National Railway Company mines to Davidson, North Carolina, are determined by use of factors to and from Baltimore, Maryland.

[6] These proportional rates cannot be applied save as they are parts of a through rate and cannot be distinguished from divisions of a joint rate. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217; *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, 463.

single factor joint rates from the Canadian mines to points in official territory. These proportional rates are restricted in the tariffs so as not to apply to any intermediate point in Canada and labeled with a reference mark, the explanation of which reads as follows: "Proportional rate, applicable only on shipments destined to points in the United States." The proportional rates to East Alburgh, Vermont, are published by the Canadian National Railway Company for application from mines on its line in the province of Quebec. The line of the Canadian National Railway Company extends across the international boundary about 3.1 miles to East Alburgh, Vermont, where it connects with the line of the Central Vermont Railway, Incorporated. The proportional rates to Newport are published by the Quebec Central Railway Company for application from mines on its line in the province of Quebec. The Quebec Central Railway Company extends across the international boundary about 5 miles to Newport, Vermont, where it connects with the Canadian Pacific Railway Company.[7]

The Commission held that the proportional rates maintained by the Canadian lines to East Alburgh and Newport, Vermont, were published to interior points in the United States and obligated the Canadian carriers to provide a substantial transportation service within the United States (R. 73).

The local rates[8] applicable from East Alburgh and Newport, Vermont, were and are all class rates with the

[7] The Quebec Central is a subsidiary of the Canadian Pacific. See *Canadian Pacific Railway Company Lease*, 105 I. C. C. 575, 576.

[8] These local class and commodity rates were and are published to apply on traffic originating at East Alburgh or Newport, Vermont. These contain an originating terminal charge and a terminating terminal charge. During the oral argument before the Commission the appellees admitted that no asbestos traffic originates at East Alburgh and Newport. These local rates do not reflect the charge for the transportation service rendered. It is obvious that the appellees have made no attempt whatsoever to comply with the provisions of the statute, as interpreted by this Court, to make and establish rates either from the international boundary line or from East Alburgh and Newport to Carolina destina-

single exception of rates applicable on asbestos fiber to Charlotte, Davidson, and Marshville, North Carolina, which are commodity rates. These class rates are the class 35 rates prescribed by the Commission in Docket No. 28300—**Class Rate Investigation, 1939**, 281 I. C. C. 213. The commodity rates have as their base the class A rates in effect prior to Docket No. 28300 revision. The class A, or eighth class, rate from Newport to Charlotte was published as a commodity rate to apply over routes not generally available under class-rate routing. Due to lesser general increases authorized by the Commission on commodity rates than on class rates, and the readjustment of the class rates by order of the Commission in Docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates from East Alburgh and Newport, Vermont, to Charlotte, Davidson, and Marshville, North Carolina, over all authorized tariff routes. (R. 66.)

As previously stated, the Commission found the assailed rates to be both unduly preferential and prejudicial, in violation of the Act (49 U. S. C. 3(1)) and ordered the carriers to establish rates for application on shipments to Carolina destinations which would not exceed the rates to points in official territory by more than specified amounts[9] (R. 77). The Commission also found that the assailed through rates to the Carolina destinations were unjust and unreasonable and in violation of the Act (49 U. S. C. 1(5)), and that the "Carolina Consumers" were damaged and entitled to reparation (R. 78). In the March 11, 1959, order the Commission clarified its prior order of May 7, 1958, so as to indicate that the carriers were left with alternatives in removing the discrimination found to violate the Act (49 U. S. C. 3(1)) (R. 232).

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tions which reflect the transportation service rendered in connection with the interchange (R. 199). *See Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654, 660.

[9] See Note 1, page

The appellees, as defendants before the Commission, in their brief filed with that agency relied entirely on the contention that the Commission was without jurisdiction to determine the issues raised by the complaints since international rates were involved (R. 179). The Commission found this contention to be without merit.

The District Court set aside the decision of the Commission, and annulled the orders entered by the Commission, on the theory that the through rates assessed "Carolina Consumers" on international shipments of asbestos from Canadian origins to the Carolina destinations contained a proportional factor which was not subject to the Commission's jurisdiction (R. 242, 253).

The "Carolina Consumers" in their complaints before the Commission assailed the through transportation charges assessed them—they complained of the **through rate as a unit**. They did not complain merely of the aggregate of the individual proportional and local rates customarily charged by the defendants for transportation service rendered by the respective participating lines in the through routes. They complained of the single charge which was assessed for the transportation service from the point of origin in Canada to the point of destination in the Carolinas.[10] The Commission considered the assailed rates as being single units of charge for single units of transportation and disposed of the complaints in accordance with established precedents and existing law.

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[10] See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, *supra*, at page 233.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission is an arm of Congress, created for the purpose of administering the Interstate Commerce Act as amended. Its territorial jurisdiction reaches to the international boundary line where that of Congress itself halts. Its jurisdiction over rail carriers performing a transportation service within the boundaries of the United States is co-extensive with that of the Federal Government.

On international traffic moving from Canada to the United States the Act applies not only to the rail carriers rendering transportation service from the international boundary line, but also to the commodities being transported.

II

Under the Act it was, and is, the statutory duty of the appellee railroads to make and establish just and reasonable rates, which are not unduly preferential or unduly prejudicial, from the international boundary line to destinations in the United States. The appellees failed to make or publish any rates applicable on asbestos from the international boundary to destinations in the United States situate in either official territory or the Carolinas. This failure constituted a breach of their statutory duty, and compelled appellants to pay through charges which were unduly prejudicial to themselves and unduly preferential of their competitors located in official territory. The breach also permitted competitors to pay through charges which were unduly preferential to them and unduly prejudicial to appellants. Appellants were compelled to pay the through charges which were unjust and unreasonable.

The Act provides that "All charges made for any service rendered or to be rendered in the transportation of pas-

sengers or property * * * shall be just and reasonable * * *" (49 U. S. C. 1(5)); and makes it unlawful "* * * to make, give, or cause any undue or unreasonable preference or advantage to any * * * company, firm, corporation * * * in any respect whatsoever", or to subject them "* * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." (49 U. S. C. 3(1)). The appellee carriers were and are under a requirement to impose just and reasonable charges which are non-preferential or prejudicial for the transportation service rendered.

III

The Commission found that the appellee carriers, in lieu of establishing rates from the international boundary line to destinations in official territory, had since the turn of the century made and established single factor joint rates for application on asbestos for the use and benefit of appellants' competitors located in that territory. The Commission found that these single factor joint rates were unduly preferential to competitors and were unduly prejudicial to appellants. The Act expressly prohibits this unlawfulness (49 U. S. C. 3(1)).

The appellees and the District Court concede that the Commission had, and has, jurisdiction to determine the lawfulness of single factor joint rates applying from an origin in Canada to a destination in the United States. The complaints before the Commission put in issue the lawfulness of the rates from Canada to destinations in official territory. The Commission had jurisdiction to order removed any unlawfulness found to exist. Certainly it was within the power of Congress to prohibit the appellee carriers from practicing the discrimination found to exist. The Act does not authorize or forbid the making of single factor joint through international rate; however, it specifically prohibits the granting or causing to be granted "* * * any

undue or unreasonable preference or advantage to any particular person, company, firm, corporation. * * *". The Commission found that the appellees had violated this prohibition. Standing alone, without any consideration of the method of tariff publication of rates to the Carolinas, this statutory provision gives the Commission jurisdiction to order removed the unlawfulness found to exist.

Jurisdiction of the Commission to determine the lawfulness of an alleged preferred rate granted to competitors and the lawfulness of the alleged prejudicial rate assessed complaining shippers is inherent in section 3(1) of the Act (49 U. S. C. 3 (1)).

Further, the Commission had jurisdiction to determine the lawfulness under the Act (49 U. S. C. 3(1) of the through rates assessed appellants even though such rates were not published as single factor joint rates. The through charges assessed were made on a combination basis over East Alburgh and Newport, Vermont. The fact that these points are ports of entry is immaterial. The method of tariff publication is of no legal significance for the Act (49 U. S. C. 6(1)) recognizes that through transportation charges may be published as single factor joint rates or in the form of combination rates. The Commission has power to remove unjust discrimination in both classes of cases. See *United States v. Illinois Cent. R. Co.*, 263 U. S. 515. A through route existed and transportation was performed by virtue of an implied arrangement between the participating carriers.

The Commission found that the through charges assessed appellants were unduly prejudicial and unduly preferential of their competitors in official territory.

Unlawfulness was found to exist under the Act (49 U. S. C. 3(1)) in the rate adjustment to destinations in official territory and to destinations in the Carolinas. The discrimi-

nation was ordered removed and the appellee carriers required, insofar as transportation in the United States is concerned, to make and establish rates to Carolina destinations which would not exceed rates to Ambler, Pennsylvania, by more than certain designated differentials. This is not regulation of through rates from Canada to either official territory destinations or to Carolina destinations. It is regulation of the amount of the differential in rates which may exist between the rate adjustment made and maintained to Ambler, Pennsylvania, and that to the Carolinas. The appellee carriers are at liberty to revise the rate adjustment to Ambler and relate the Carolina adjustment thereto.

IV.

The Commission had jurisdiction to entertain the complaint and consider the reasonableness of the through rates assessed appellants. The complaints conformed with a fixed rule of the Commission, and of this Court, that where damages are claimed, the through transportation charges must be assailed and found unreasonable. The principle announced by the Court in *News Syndicate Co. v. New York Cent. R. Co.*, 275 U. S. 179; *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, 283 U. S. 654; and *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458, controls disposition of the issue, in the instant case, relating to the jurisdiction of the Commission involving damages.

Insofar as damages are concerned "The shipper's only interest is that the charge shall be reasonable as a whole." This is true both as to domestic and international shipments. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217; *News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry Co. v. Sullivan, supra;* and *E. A. Brown Produce Co. v. Atchison, T. & S. F. Ry. Co.*, 278 I. C. C. 433.

All rail carriers subject to the Act, participating in the assessment of unjust and unreasonable through charges, domestic or international, are joint tort-feasors. This is true whether the through charges are based on single factor rates, combination of proportional rates, combination of proportional and local rates, or combination of local rates. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry. Co. v. Sullivan, supra; and Atlantic & Y. Ry. Co. v. Carolina Button Corporation*, 74 F. (2d) 870.

V

The District Court erred in holding that the Commission's previous interpretation of the statute necessitated setting aside and annulling the orders entered in connection with decision of May 7, 1958.

The District Court draws no distinction between the Commission's previous administration of the Act as it relates to discrimination or as it relates to damages.

In the past the Commission has ordered removed unjust discrimination found to exist in rate adjustments involving through international rates made on a combination basis.

The District Court relied heavily on Commission decisions indicating that it did not have jurisdiction to entertain complaints which assailed through international rates, made combination over international border points, as being unjust and unreasonable (49 U. S. C. 1(5)), and prayed rates for the future, with a request for damages. The Commission's comments in the decisions cited by the District Court, insofar as they relate to damages, are erroneous as a matter of law.

The Commission decisions, for the most part, were rendered prior to this Court's decision in *Great Northern Ry. Co. v. Sullivan, supra.* Prior to that decision the Commission had applied different rules in determining damages incurred by shippers in connection with domestic shipments and international shipments. On domestic shipments the rule was, and still is, where reparation is prayed the complaint must assail the through transportation charge, regardless of whether combination rates are involved, and then found unreasonable. A different rule was applied on international shipments and this was to the effect that if a factor of the combination rate was beyond the jurisdiction of the Commission, the complaint had to be restricted to the domestic factor. This rule, of course, violated the principle that "The shipper's only interest is that the charge shall be reasonable as a whole." This Court in *Great Northern v. Sullivan, supra,* applied the rule in connection with international shipments.

Under the circumstances any comments made by the Commission relating to its jurisdiction in connection with international rates prior to the doctrine enunciated in the *Sullivan case, supra,* in 1935 must be closely scrutinized to determine the correctness thereof from a legal standpoint.

Errors of law committed by the Commission, or misinterpretations of the law by the Commission, is no bar to valid exercise of jurisdiction conferred by the Congress. As this Court stated in *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, at page 352: "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise."

VI

The Commission has jurisdiction to consider the lawfulness of the proportional rate to East Alburgh and Newport, Vermont, for future application.

It can order the proportional rates cancelled and require the establishment of just and reasonable rates, free of discrimination, not only from the international boundary line to East Alburgh and Newport, Vermont, but also to destinations in the Carolinas.

These proportionals cover a transportation service rendered in the United States from the international boundary line to East Alburgh and Newport, Vermont. The tariffs on file with the Commission obligate the Canadian National Railway Company and the Quebec Central Railway Company to perform this transportation service. The Commission and the hearing examiner found that this service was substantial. By its very nature it is substantial for if this component part were not rendered, no through transportation service would be available from Canadian origins to destinations in the United States via East Alburgh and/or Newport, Vermont. This finding of substantial service cannot be disturbed by the judiciary unless unsupported by the record made before the Commission.

The District Court concedes that the Commission would have jurisdiction should either the Canadian National Railway Company or the Quebec Central Railway seek to discontinue service between the international boundary line and East Alburgh or Newport, Vermont, respectively; or should they seek to lease the trackage. The District Court held, however, that the Commission did not have jurisdiction over a rate applying in part for transportation service over these same tracks. The District Court says, "The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers." There is nothing in the Act which supports the distinction between Commission jurisdiction over tracks as against rate matters. There is no decision of a court of competent jurisdiction, or the Commission, which makes such a distinction.

The Commission would never consider proportional rates, which are in the nature of divisions, from the standpoint of damages for the through rate must be assailed and considered as a whole.

ARGUMENT

The questions presented herein relate to:

(a) The jurisdiction of the Commission to require the removal of undue preference and undue prejudice found to exist in an international rate adjustment covering asbestos and related commodities voluntarily established and maintained by rail carriers for application from mines in Quebec, Canada, to points in United States official territory and in the Carolinas; and

(b) The power of the Commission is to award damages when it found that the through transportation charges, constructed on a combination basis, assessed "Carolina Consumers" were unjust and unreasonable in the past.

The District Court restricted its consideration to a single question, which was: "Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?" (R. 242) and then approached this case in the following manner:

> * * * plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. **Plaintiffs' argument before this court is confined to the contention that the Commission exceeded** [Fol. 291] **its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas.** (R. 244-245.) (Emphasis supplied.)

It will be noted that the appellees' argument before the District Court was confined to the contention that the Commission had exceeded its power in failing to limit its jurisdiction to the local rates published by the participating carriers in the through transportation from East Alburgh and Newport, Vermont, to destinations in the Carolinas.

The District Court recognizes that the Commission has jurisdiction over single factor joint international rates (R. 246-247). Its action in annulling the Commission's orders was based solely on the proposition that the rates to the Carolinas were not single factor joint rates but rates made on a combination basis.[10a]

The fact that rates to the Carolinas are made on a combination basis is the result of the choice of the appellees' method of tariff publication. Section 6(1) of the Act (49 U. S. C. 6(1)) recognizes that the appellees had a perfect right to publish rates to the Carolinas in the form and manner chosen rather than as single factor joint rates.

Hence the District Court's interpretation places in the hands of the appellee carriers a tool whereby they can discriminate at will, or otherwise injure users of international transportation service, and defeat the main purpose of the Act.

[10a] The District Court's basic reason for this holding is the fact that the proportional rates applied on traffic interchange at the Vermont points, and that no interchange facilities were available at the international boundary line (R. 247). The Commission stated that it did not perceive how this would affect the situation since it had jurisdiction over the rail carriers to the extent that they operated within the United States (R. 75). This point is developed in detail hereinafter under Point VI, page 48.

I

THE INTERSTATE COMMERCE ACT APPLIES FROM THE INTERNATIONAL BOUNDARY LINE TO INTERIOR DESTINATIONS IN THE UNITED STATES

Sections 1(1)(a) and (2) of the Act (49 U. S. C. 1(1)(a) and (2)) relate to rail carriers subject to regulation and transportation subject to regulation. Insofar as international transportation is concerned these sections, in pertinent part, read as follows:

> "Carriers subject to regulation
>
> "(1) The provisions of this chapter shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad * * *
>
> * * *
>
> "* * * from or to any place in the United States to or from a foreign country, **but only insofar as such transportation * * * takes place within the United States.**
>
> "Transportation subject to regulation
>
> "(2) The provisions of this chapter shall also apply to such transportation of passengers and property * * * **but only insofar as such transportation * * * takes place within the United States.** * * *" (Emphasis supplied.)

These statutory provisions reflect the amendment made by Congress in the "Transportation Act," 1920 (36 Stat. 544, Feb. 28, 1920). In *International Nickel Co. v. Director General*, 66 I. C. C. 627, decided in 1922, at page 629, the Commission said:

> It is said that the amendments made by the transportation act, 1920, in section 1 of the act to regulate commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry our territorial juris-

> diction up to the international boundary line, at which that of Congress itself halts. Our territorial jurisdiction as to foreign commerce is thus coextensive with that of the federal government. No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the interstate commerce act has full effect just as the federal control act had effect when these shipments moved.

In *News Syndicate Co. v. New York Cent. R. Co., supra,* pp. 186-187,[11] decided in 1927, this Court, speaking through Mr. Justice Butler, held:

> The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City, Section 1(1) and (2).

Prior to the amendment, insofar as it is here pertinent, section 1(1) (36 Stat. 544) declared that the Act applied from the United States to an adjacent foreign country.[12] In *Black Horse Tobacco Co. v. I. C. R. R. Co.*, 17 I. C. C. 588, decided in 1910, the Commission applied the same principle and rule of law as restated in *International Nickel Co. v. Director General, supra.*

The Commission has on numerous occasions either declared its power to require, or entered orders requiring, carriers operating in the United States to remove undue preference and undue prejudice found to exist in international rate adjustments; and in addition, has awarded damages where it appeared that the rail carriers had partici-

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[11] Followed and restated by this Court in *Lewis-Simas-Jones Co. v. Southern Pac. Co., supra,* decided in 1931.

[12] This Court in *Galveston, H. & S. A. Ry. Co. v. Woodbury,* 254 U. S. 357 (1920), a case decided under section 1(1) (49 U. S. C. 1(1) as it existed prior to the 1920 Amendments, held that transportation from an adjacent foreign country to the United States was within the Commission's jurisdiction under the provision relating to the transportation from the United States to an adjacent foreign country.

pated in the assessment of unjust and unreasonable through transportation charges.[18]

It is clear that the various provisions of the Act, as amended, apply not only to the rail carriers rendering transportation service from the international boundary line, but also to the commodities being transported.

The District Court correctly held that the Act applied to the Canadian National Railway Company and the Quebec Central Railway Company if any attempt was made to either abandon or lease any portion of the rail trackage situate in the United States between the international boundary line and East Alburgh and Newport, Vermont, respectively. The District Court erroneously held that the Act did not apply to the rates maintained by these carriers over the trackage situate in the United States. There is nothing in the Interstate Commerce Act or in any judicial authority for the distinction made by the District Court. This subject is discussed in detail hereinafter under Point V beginning with page 44.

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[18] *Rates on Soda Ash and Other Commodities*, 28 I. C. C. 613; *International Paper Co. v. D. & H. Co.*, 33 I. C. C. 270, 274; *Carey Mfg. Co. v. G. T. W. Ry. Co.*, 36 I. C. C. 203, 206; *United Paperboard Co. v. C. N. Rys.*, 74 I. C. C. 733, 737; *Washington Publishers' Assn. v. B. & O. R. R. Co.*, 98 I. C. C. 339; *Spanish River Pulp & Paper Mills v. A. & W. Ry. Co.*, 113 I. C. C. 343, 350; 120 I. C. C. 251; *Tennessee Extract Corp. v. L. & N. R. R. Co.*, 128 I. C. C. 709, 713; *Peters-Duncan v. D. M. & V. R. R. Co.*, 144 I. C. C. 55, 58; *Sand and Gravel from Canada*, 83 I. C. C. 460; *Newsprint Paper from Eastern Canada*, 109 I. C. C. 701; *Newsprint and Wall Paper*, 126 I. C. C. 166.

II

UNDER THE ACT IT WAS THE STATUTORY DUTY OF THE APPELLEE RAILROADS TO ESTABLISH JUST AND REASONABLE RATES FROM THE INTERNATIONAL BOUNDARY LINE FOR APPLICATION ON ASBESTOS TO DESTINATIONS IN THE UNITED STATES.

Section 1(5) of the Act (49 U. S. C. 1(5)) clearly states:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 6(1) and (7) of the Act (49 U. S. C. 6(1) and (7)) requires publication of rates to be charged for transportation services rendered; and the filing of appropriate tariffs with the Commission.

In *International Nickel Co.* v. *Director General*, (1922), *supra*, the Commission considered a complaint which alleged that the joint rates assessed on shipments of blister copper from Port Colborne, Ontario, Canada, were unjust and unreasonable and prayed reparation. The complaint was sustained and reparation granted. At page 628 of 66 I. C. C. the entire Commission stated that "the charging of an unreasonable rate is a tort" and that all carriers participating in the rate were jointly and severally liable for any resulting damage. The Commission referred to the provisions of sections 1(5) and 8 of the Act (49 U. S. C. 1(5) and 8) and concluded as follows:

> American lines parties to a joint rate from or to a point in Canada, the charges under which are unreasonable, "cause to be done" or "do" a thing (*i. e.*, the collection of unreasonable charges for the transporta-

tion of property) "prohibited and declared to be unlawful" by the act, and are "liable to the person or persons injured thereby for the full amount of the damage sustained."

The rule of law announced by the Commission in *International Nickel Co. v. Director General, supra*, has been approved and affirmed by this Court. In *News Syndicate Co. v. New York Cent. R. Co., supra*, page 187, it is stated:

> It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1(5); section 6(1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequence of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.

The Court in the above statement was referring to the service rendered, and the transportation performed, from the international boundary line to New York City.

In *Lewis-Simas-Jones Co. v. Southern Pac. Co., supra* (1931), this Court restated the principle of law enunciated in *News Syndicate Co. v. New York Cent. R. Co., supra*.

Under the Act it was the duty of the rail carriers, in the instant case, to establish just and reasonable rates from the international boundary line which would not be unduly preferential or unduly prejudicial; and to comply with all other provisions of the Act relating to the transportation service performed, and the commodity transported.

The appellees failed to make or publish any rate applicable on asbestos from the international boundary to either official territory or Carolina destinations. This failure constituted a breach of their statutory duty. Notwithstanding their failure to publish rates for this part of the transportation service, they were still under a requirement

to impose just and reasonable rates for the service rendered (49 U. S. C. 1(5)).

III

THE COMMISSION HAD JURISDICTION TO DETERMINE THE LAWFULNESS OF THE SINGLE FACTOR JOINT RATES TO DESTINATIONS IN OFFICIAL TERRITORY AND THE THROUGH RATES MADE ON A COMBINATION BASIS TO CAROLINA DESTINATIONS UNDER SECTION 3(1) OF THE ACT (49 U. S. C. 3(1))

In *State of New York v. United States*, 331 U. S. 284, decided May 12, 1947, this Court, speaking through Mr. Justice Douglas, at page 296 stated: "The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." See also: *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361; *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Interstate Commerce Com. v. Chicago, R. I. & P. R. Co.*, 218 U. S. 88; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467.

In *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342 (1914), this Court, speaking through Mr. Justice Hughes, in interpreting the language used by the Congress in section 3 of the Act (49 U. S. C. 3) at page 356, said:

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.

In *Castle v. Baltimore & O. R. Co.*, 8 I. C. C. 333, 345, decided in 1899, the Commission, speaking through Mr. Commissioner Yeomans, stated:

> Common carriers are bound by every principle of justice and of law to accord equal rights to all shippers who are entitled to like treatment, both in the re-

ceiving of supplies and shipment of their products; and a carrier who under any pretext whatsoever grants to one shipper an advantage which it denies another violates the spirit and thwarts the purpose of the law.

In *Carey Mfg. Co. v. G. T. W. Ry. Co.*, 36 I. C. C. 203,[14] decided by the Commission in 1915, a complaint was considered which alleged that through rates assessed on asbestos sand in carloads from Robertson, Thetford, and Sherbrooke, Quebec, Canada, to Lockland and Rockdale, Ohio, made on combination basis, subjected the complainants to unjust discrimination in favor of competitors, located at Chicago, Illinois, and Milwaukee, Wisconsin, who were assessed single factor joint rates. The Commission sustained the complaint and entered the necessary statutory finding of fact required by the Act (49 U. S. C. 3(1)):

> Upon consideration of all the facts shown of record, we are of the opinion, and find, that the rates complained of have been, are, and for the future will be, unjustly discriminatory against complainants in so far as the rates to Lockland or Rockdale exceeded or exceed the rates contemporaneously maintained from the same points to Chicago or Milwaukee.

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[14] The Commission held that it could not prescribe joint through rates from Canada to points in the United States but that it could control the rates which the American lines charged from the "ports of entry" in the United States to destinations in the United States whether such rates were joint rates or separately established rates applicable to the through transportation. The Commission further stated that its jurisdiction attached at the "ports of entry" and that as a result it could pass upon the complaint of unjust discrimination as if the traffic in question originated at Detroit and Port Huron, Michigan. The Commission stated that if its statutory finding of fact was not complied with that it would enter an order requiring the rail carriers subject to its jurisdiction to establish, in lieu of the present rates, joint and local rates from the "ports of entry" which would be no higher to Lockland or Rockdale than to Chicago or Milwaukee. (From research it appears the Commission has never used the phrase "ports of entry" again in connection with its jurisdiction.) In *Newsprint Paper to Detroit*, 161 I. C. C. 637, decided by Division 5, in 1930, jurisdiction was exercised over rates on newsprint paper from Canadian points to Detroit when it was found that the carriers had failed to establish a rate from the international boundary line, which was the middle of the Detroit River, and cited *News Syndicate Co. v. New York Cent. R. Co.*, *supra* (1927). Detroit and Port Huron are "ports of entry."

In *Cyanamid and Cyanide From Niagara Falls*, 155 I. C. C. 488, decided in 1929, the Commission investigated the lawfulness of certain proposed increased joint rates on cyanamid and crude cyanide, in carloads, from Niagara Falls, Ontario, Canada, to destinations in eastern trunk-line and New England territories, Cincinnati, Ohio, and Virginia cities. The American Cyanamid Company protested the proposed increases and requested the Commission to suspend the increases and institute an investigation as to the lawfulness of the proposed increases. The Commission's suspension and investigatory powers under the Act are conferred by section 13(2) (49 U. S. C. 13(2)). The Commission suspended the proposed increases and entered into an investigation as to their lawfulness. The statutory finding of fact entered by the Commission at page 500 of its decision reads as follows:

> We find that the suspended schedules and concurrences have not been justified. An order will be entered requiring their cancellation and discontinuing this proceeding, without prejudice, however, to the filing of new schedules and concurrences in conformity with the views expressed herein.

The inevitable question of jurisdiction was raised. The carriers participating in the proposed increased joint rates challenged the Commission's jurisdiction to suspend the proposed international joint rates. The Commission held that it had power to suspend the schedule carrying the proposed increased rates and found that the proposed increases had not been justified under the Act.

In *Consolidated Mining & S. Co. of Canada v. N. Y. C. R. Co.*, 299 I. C. C. 231, decided by Division 2 in 1956, it was held that under section 3(1) of the Act the Commission had jurisdiction to determine the lawfulness of through rates made on a combination basis over Chicago, or Chicago junctions, applicable on pig lead and slab zinc from Tadanac,

British Columbia, Canada, to eastern destinations. It was found that the assessed rates were unduly prejudicial to complainants and that the single factor joint rates assessed competitors operating in western United States and enjoying single factor rates to eastern destinations had been unduly preferred. The unlawful discrimination was ordered removed.

Thus in the past the Commission has exercised jurisdiction over international through rates, be they single factor rates, or rates made on a combination basis, and required the removal of unlawful discrimination found to exist.

Appellees, when before the Commission, argued that the Commission was without jurisdiction to order the removal of any undue preference or undue prejudice which might exist in the international rate adjustment on asbestos from Canadian origins to destinations in official territory and in the Carolinas. Their argument was predicated solely on the fact that the through rates assessed to the Carolina destinations were made on a combination basis over the "ports of entry" of East Alburgh and Newport, Vermont, and such ports for all practical purposes should be considered as the international boundary line. The argument was rejected by the Commission.

The argument overlooks entirely the fact that the single factor joint rates to official territory were brought in issue as being violative of the Act (49 U. S. C. 3(1)). The Commission specifically held: "It is clear that the complainants' competitors at Ambler and other destinations in official territory are being unduly preferred to the undue prejudice and disadvantage of the complainants * * *" (R. 76).

The Act (49 U. S. C. 3(1)) specifically prohibits the granting or causing to be granted "* * * any undue or unreasonable preference or advantage to any particular per-

son, company, firm, corporation * * *", *a fortiori*, the Commission has power to order the discrimination removed. The issue with respect to single factor joint rates to official territory is one of undue preference and prejudice. The Commission's power to order it removed has been exercised a number of times. See *Inland Empire Paper Co. v. Great Northern Ry. Co.*, 219 I. C. C. 501, 511.

In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. Rep. 37, decided in 1890, affirmed by this Court in 1892 in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, it is stated that the language used in section 3 of the Act (49 U. S. C. 3) was both in the affirmative and negative and involved the element of comparison of one service and charges with others similarly situated and circumstanced. At page 47 it is stated:

> Persons in like situations, requiring or desiring like and contemporaneous service on the part of carriers, were to be treated, in the matter of rates, impartially. This is expressed both affirmatively and negatively in the language of section 3. The carrier shall not give any undue or unreasonable preference or advantage to or in favor of any particular person, company, or traffic, nor subject any particular person, company, or traffic to any undue or unreasonable prejudice or disadvantage. These words necessarily involve the idea or element of comparison of one service or traffic with another similarly situated and circumstanced, and require that, to be undue and unreasonable, the preference or prejudice must relate and have reference to competing parties, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an undue preference or impose an undue prejudice or disadvantage, consideration must be had to the relation which the persons or traffic affected bear to each other

and to the carrier. When and so long as their relations are similar or "substantially" so, the carrier is prohibited from dealing differently with them in the matter of charges for a like and contemporaneous service.

We turn now to the through rates assessed to the Carolinas which were made on a combination basis. The Commission found that these rates were "unduly prejudicial to complainants and unduly preferential of the complainants' competitors in official territory * * *" (R. 77).

Undue prejudice may be inflicted as effectively by a through rate made on combination basis as by a joint rate.[15] Such a distinction would be without legal significance since the Commission has power to remove unjust discrimination in both classes of cases. This was settled in *United States v. Illinois Cent. R. Co., supra*, decided in 1924, when, speaking through Mr. Justice Brandeis, this Court stated at page 527:

> * * * The rate to the short line points is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, express or implied.[9] Undue prejudice may

[15] The District Court erred in distinguishing as follows:

> The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. (R. 247.)

The District Court also erred in holding that the Commission should have made findings as to transportation charges for that tansportation service rendered in the United States (R. 248). Appellees published no rates from either the international boundary line or from East Alburgh and Newport to destinations in official territory. Single factor joint through rates were assessed. The form of tariff publication employed by appellees made it impossible for the complainants or the Commission to deal with rates from the boundary line under section 3(1) of the Act (49 U. S. C. 3(1)).

If rates were maintained by the appellees from the international boundary line to destinations in official territory and destinations in the Carolinas, then the burden was on them to say what they were and where they could be found. This they did not do. See *Lewis-Simas-Jones Co. v. Southern Pac. Co., supra.*

be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases. See *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139, note 2, 38 Sup. Ct. 49, 62 L. Ed. 199.

In note 2 described in reference 9 above this Court referred to the decision of the Commission in *Through Routes and Through Rates*, 12 I. C. C. 163, which was decided by the Commission in 1907. This decision is a landmark in interstate commerce law. It not only dealt with through routes and through rates but also with the duties and obligations of the rail carriers with respect to the publication of rates and charges required by the Act. It was in this case that the Commission emphasized that a through route is a **unit** of service and the rate assessed for the **unit** of service was likewise a **unit**. For ready reference the following excerpts taken from page 166 of 12 I. C. C. are submitted:

> A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. It must have a rate for every service it offers, and, **as the route is a new unit**—one line formed of two or more connecting lines—**so its rate for every service is a unit**, even though it be divided between the several carriers arranging themselves into the through route. As was said by the Commission in *Brady v. P. R. Co.*, 2 I. C. C. Rep., 131, "through carriage implies **a through rate**." This is equally true whether the through rate be published as a whole by the joint action of the connecting carriers, or, in the absence of a joint arrangement, be published in portions by the several carriers. The route being one, **a charge for a service over it is a charge for a single service**, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the engagement for the service. The rate is either a joint through rate made by arrangement by the par-

ties to the through route, or it is a combination through rate consisting of "the separately established rates, fares, and charges applied to the through transportation." **This sum, however, is a single rate for a single service,** and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established, in force at the time the shipment is billed. (Emphasis supplied.)

In 1952 this Court dealt with the subject matter in *Thompson v. United States*, 343 U. S. 549, pp. 556-557, which states:

> * * * The statutory term "through route," used throughout the Interstate Commerce Act, has been defined by this Court as follows:
>
> > "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. **Through carriage implies a 'through rate.'** This 'through rate' is not necessarily a 'joint rate.' It may be merely an aggregation of separate rates fixed independently by the several carriers forming the 'through route'; **as where the 'through rate' is 'the sum of the locals' on the several connecting lines** or is the sum of lower rates otherwise separately established by them for through transportation. **Through Routes and Through Rates,** 12 I. C. C. 163, 166". * * *
>
> In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service. (Emphasis supplied.)

In the instant case there is no question as to the existence of a "through route" nor "whether the participating carriers held themselves out as offering through transportation service." It must be conceded by appellees that

through routes exist from the Canadian origins to the Carolina destinations, and that for many years the appellees have held themselves out to render a through transportation service, and in fact have handled many thousands of cars of asbestos to the Carolinas under the through rates constructed on a combination basis.

The Canadian National Railway and Quebec Central Railway, as originating carriers, issued the bills of lading, collected the through transportation charges from the asbestos producers in Canada, who in turn billed the "Carolina Consumers" for the said charges. All of the terms and conditions of the contract of through carriage were entered into at one and the same time. These Canadian carriers acted in their own behalf and as agents for the other carriers participating in the through transportation. *Through Routes and Through Rates, supra.*

It cannot be argued that the Commission was without jurisdiction to determine the issues under section 3(1) of the Act (49 U. S. C. 3(1)) because single factor joint rates were assessed competitors in official territory, whereas combination rates were assessed "Carolina Consumers". No such argument could be made meritorious on the ground that in the case of the single factor joint rates an express agreement was involved, whereas in the case of combination rates express agreement was lacking. In the case of combination rates the agreement was implied. This matter was well settled even before this Court's decisions in *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139, decided in 1917; *United States v. Illinois Cent. R. Co., supra*, decided in 1924; and *Thompson v. United States, supra*, decided in 1952.

In *Kansas City S. R. Co. v. C. H. Albers Com. Co.*, 223 U. S. 573, decided in 1912, at pages 597 and 598, this Court, speaking through Mr. Justice Van Devanter, said:

"If an initial carrier accepts traffic for transportation and issues its bill of lading over a route made up of connecting roads for which no joint through rate has been published and filed with the Commission, the lawful rate to be charged is the sum of the established local rates published and filed by the individual roads; or if, as was the case here, there is a local rate over one road and a joint rate over the others for the remainder of the route, all published and filed with the Commission, the lawful through rate to be charged is the sum of the local and joint rates. By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, **each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged.** It is competent for carriers, if conditions justify it, to make their proportions of a through rate less than the local charges upon their own lines, but in doing so they should observe legal methods, and if no action to that end is taken, they in effect adhere to the rates established, published, and filed by them as applying not only to local but through traffic." (Emphasis supplied.)

It may be argued that the Commission did not have jurisdiction to order the unlawful discrimination removed because international rates are involved and the Commission is not empowered to regulate such rates. Such an argument would be unsound for two reasons: (1) In the instant case the Commission required the unlawful discrimination be removed through the requirement that rates to the Carolina destinations should not exceed by more than certain designated amounts the rates published and maintained to Ambler, Pennsylvania. As stated, its order of March 11, 1959 (R. 225-226), dispelled any doubt that the method of adjusting rates to remove the unlawful discrimination found to exist was left to the option of the rail carriers. This is regulation of the amount of the differential which

can exist between rates to Ambler, Pennsylvania, and to the Carolina destinations. It is not regulation of through rates from Canada to either official territory destinations, such as Ambler, or to Carolina destinations, such as Charlotte. (2) Freedom from regulation of through transportation charges from Canadian origins to destinations in the United States does not imply that the appellees can discriminate at will.

In *St. Louis, B. & M. Ry. Co. v. Brownsville Nav. Dist.*, 304 U. S. 295, decided May 16, 1938, this Court was called upon to consider whether, under the 1920 act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that American railroads could not discriminate against shippers, places, or classes of traffic within the United States even though they were under no duty to furnish cars for transportation on a Mexican railroad. The exact words of this Court at page 300 were as follows:

> * * * Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. But that freedom from obligation does not imply that, in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. Cf. *Lewis, etc., Co. v. Southern Pac. Co.*, 283 U. S. 654.

IV

THE COMMISSION HAD JURISDICTION TO DETERMINE THE REASONABLENESS OF THE THROUGH RATES ASSESSED APPELLANTS UNDER SECTION 1(5) OF THE ACT (49 U. S. C. 1(5)) FOR THE PURPOSE OF AWARDING DAMAGES

Upon proper complaint the jurisdiction of the Commission to determine the reasonableness of international

through rates applicable over through routes under section 1(5) of the Act (49 U. S. C. 1(5)) for the purpose of awarding damages as authorized by sections 8 and 16(1) of the Act (49 U. S. C. 8 and 16(1)) is beyond question.

In the instant case the complaints before the Commission challenged the assessed through transportation charges, alleged that they were unjust and unreasonable, and prayed damages. This conformed with a fixed rule of the Commission, and of this Court, that where damages are claimed, the through transportation charges must be assailed and found unreasonable.

In *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, this Court considered a failure of rail carriers to comply with the statutory duty imposed by the Act to establish just and reasonable rates from the international boundary line to New York City for application on paper. The shipments originated at Thorold, Ontario, Canada, and moved over through routes to New York City. This failure constituted a tortious act but "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." *News Syndicate case*, *supra*, p. 187.

In the instant case the District Court refused to apply the principle enunciated in the *News Syndicate case*, *supra*, because the through rates were made on a combination basis. This Court in *Great Northern Ry. Co. v. Sullivan*, *supra*, held that the principle announced in *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, and *Lewis-Simas-Jones Co. v. Southern Pac. Co.*, *supra*, controlled disposition of a case which involved through rates made on a combination basis.

In *Great Northern Ry. Co. v. Sullivan*, *supra*, the essential facts were as follows. Certain parties filed complaints with the Commission and alleged that the proportional rates assessed by the Great Northern Railway Company, and other American carriers, from the international bound-

ary line, were unjust and unreasonable in violation of the Act (49 U. S. C. 1) and prayed the establishment of reasonable maximum American proportionals, for future application, and reparation on past shipments. The through rates, made on a combination basis, were not assailed, and neither was the Canadian Pacific proportional which constituted one factor of the through rate. The Commission found that the assailed proportional rate maintained by the Great Northern Railway Company, and other American carriers, was unjust and unreasonable, and awarded reparation. Thus there was a finding by the Commission that the Great Northern Railway Company and other American carriers had committed a tortious act in that they had established and maintained unjust and unreasonable rates from the international boundary to the interior destinations in the United States in violation of the Act (49 U. S. C. 1(5)). This tortious act was comparable to the tortious act committed in the *News Syndicate Company case, supra,* by the carriers there involved in failing to establish just and reasonable rates from the international boundary line for application on paper to New York City. In both cases this Court held that there had to be a further tortious act committed in connection with the through transportation charges actually assessed before the Commission had jurisdiction to make an award of damages under sections 8 and 16(1) of the Act (49 U. S. C. 8 and 16(1)).

In the *News Syndicate Company case, supra,* the order of the Commission awarding damages was sustained because there the **through rate** had been assailed and found unjust and unreasonable.

In the *Great Northern Ry. Co. v. Sullivan case, supra,* the order of the Commission was **not sustained** because "There being no claim or finding to the contrary, the charges collected on the shipments must be deemed to have

been just and reasonable." This Court further pointed out that the Commission under the Act (49 U. S. C. 1) has power to determine the reasonableness of one factor of a through rate assessed over a through route without determining whether its "application has resulted or will result in pecuniary loss or damage to the shipper." The Court further stated that the Commission may determine whether a proportional rate constituting one factor of a through rate violates the Act (49 U. S. C. 1), as to the future, without passing upon the validity of the rate as a whole, and cited *Atchison, T. & S. F. Ry. Co. v. United States*, 279 U. S. 768, 776. It is significant that this Court in holding that "the Commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable" cited in support thereof *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, page 187. This can only mean that the same legal principle which applies to single factor joint international rates, insofar as reparation is concerned, applies also in connection with through international rates made on a combination basis.

In the instant case the complainants before the Commission assailed the through transportation charges assessed on asbestos originating in the province of Quebec and destined to Carolina points, as being unlawful under the Act (49 U. S. C. 1(5)) and prayed damages in the form of reparation.

The deficiencies pointed out by this Court in *Great Northern Ry. Co. v. Sullivan*, *supra*, do not exist in the case at bar.

The salient legal principle announced by this Court in the *News Syndicate Company case*, *supra*, *Lewis-Simas-Jones case*, *supra*, and *Great Northern Ry. Co. v. Sullivan*,

supra, is to the effect that "the shipper's only interest is that the charge shall be reasonable as a whole."

In the landmark decision of this Court dealing with the powers of the Commission to make an award of damages this Court said: "The shipper's only interest is that the joint rate be reasonable as a whole." *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra* (1925). In the cited case the authority of the Commission to make an award of reparation in connection with domestic interstate shipments was being considered.

It may be argued that this basic principle announced by this Court in 1925 is not applicable when a question of reparation is involved in connection with through international shipments. Such an argument, if made, would be without merit. In *News Syndicate Co. v. New York Cent. R. Co., supra* (1927), this Court applied the principle when it stated that: "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error". In *Great Northern Ry. Co. v. Sullivan, supra*, p. 463, it is stated: "The shipper's only interest is that the charge shall be reasonable as a whole." In both the *News Syndicate Company case, supra*, and in the *Great Northern Ry. Co. v. Sullivan case, supra*, which involved international rates, this Court cited in support of the stated principle its previous holding in *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra.*

In finding the through rates on asbestos from Canadian origins to Carolina destinations unjust and unreasonable, and awarding damages, the Commission administered the Act according to a fixed rule which it laid down in 1916 in *Stevens Grocer Co. v. St. L., I. M. & S. Ry. Co.*, 42 I. C. C. 396. It was stated at page 398:

> * * * It is important that the true rule be definitely announced and that a **uniform policy be established un-**

der which parties complainant and defendant may understand what is required. We now lay down the rule, which for the future will be strictly adhered to, that when a complaint involves charges applicable to a through shipment the through rate or charge must be brought in issue and the participating carriers must be made defendants. When the through rate or charge is made up of separately established rates or charges, applicable to the through business, **the through rate or charge must be attacked as violative of the act**, although the violation may be believed to be occasioned by a particular factor or factors thereof; in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors. (Emphasis supplied.)

In *Cairo Board of Trade v. C., C., C. & St. L. Ry. Co.*, 46 I. C. C. 343, decided in 1917, the Commission reaffirmed the principle stated in the *Stevens Grocer Co. case, supra*, but modified it insofar as rates for the future are concerned.

The modified principle was restated in 1929 by the Commission in *Atlantic Terra Cotta Co. v. Atlanta & W. P. R. Co.*, 151 I. C. C. 45 at page 52:

> In *Cairo Board of Trade v. C., C., C. & St. L. Ry. Co.*, 46 I. C. C. 343, 350, we announced a principle, **which has since been consistently followed, that where a through rate is made up of separately established components** we may pass upon the lawfulness of any one of the components independent of the others for the future, **but where the matter of reparation on past shipments is concerned the total through charges must be considered.** This principle is applicable here and necessitates separate consideration of the rates in the past and for the future. (Emphasis supplied.)

In *Alberta Coal Sales Co. v. C. N. Rys.*, 142 I. C. C. 543, decided in 1928, the Commission was considering a complaint which had **assailed only the proportional** rate ap-

plied from the international boundary as being unjust and unreasonable and prayed reparation. The Commission departed from the principle announced in 1916 in the *Stevens Grocer Co. v. St. L., I. M. & S. Ry. Co., supra*, relating to damages and condemned the proportional rate applicable on coal from the international boundary to interior destinations in the western part of the United States, and awarded damages.

Evidently the Commission was of the opinion that the rule of law governing the disposition of complaints seeking reparation in connection with domestic interstate shipments did not apply when international shipments were involved. Reparation was granted even though the through rate had not been assailed and even though the through rate had not been found unreasonable. Commissioner Brainerd dissented on this point and at page 548 of 142 I. C. C. he stated:

> * * * A through rate may be reasonable, although one of its elements is not. **It is immaterial that the through rate be a combination of locals or proportionals rather than a joint rate.** In the ascertainment of damages, the commission has jurisdiction to determine the reasonableness of the through rate. The through rate being reasonable, no damage can have resulted therefrom to the complainant. *News Syndicate Co. v. N. Y. C. R. R. Co.*, 275 U. S. 179, 187. (Emphasis supplied.)

In *Great Northern Ry. Co. v. Sullivan, supra*, this Court reviewed the Commission's decision in *Alberta Coal Sales Co. v. C. N. Rys., supra*, and held that the Commission was without jurisdiction to award damages since the through rate had not been assailed and found unreasonable. The Court reiterated its language in *News Syndicate Co. v. New York Cent. R. Co., supra*, with regard to the necessity of finding that the through transportation charges assessed were unjust and unreasonable in violation of the Act (49 U. S. C. 1(5)) before damages could be awarded.

It is firmly established that the Commission's jurisdiction to award damages in the form of reparation is the same whether the shipments involved are **domestic or international.**[16] In the instant case the Commission's decision of May 7, 1958, recognized and applied the fixed rule of law governing damages and entered specific findings of fact to support the action taken.

It may be argued that appellants, "Carolina Consumers", should have restricted their complaint before the Commission to allege **only that the local rates** from East Alburgh and Newport, Vermont, to Carolina destinations, were unjust and unreasonable in violation of the Act (49 U. S. C. 1(5)). Such an argument would be without merit, for as shown above, this Court and the Commission has consistently held that **insofar as reparation is concerned** the through rate must be assailed and found unreasonable by the Commission before reparation can be awarded.[17]

The appellees in constructing the assailed through rates assessed, added the local rates from East Alburgh

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[16] In *E. A. Brown Produce Co. v. Atchison, T. & S. F. Ry. Co., supra,* decided in 1950, at page 436 it stated:

> . . . *Whether the movement is domestic or international, the through charge to the shipper,* and not divisions of the joint through rate *nor the individual factors composing a combination rate,* is what determines the reasonableness of the through rate. See *Great Northern Ry. v. Sullivan, supra,* wherein, in annulling an award of reparation of this Commission based upon a finding of unreasonableness in the domestic factor of an international combination rate, the Court said: "The shipper's only interest is that the charge shall be reasonable as a whole." (Emphasis supplied.)

[17] The District Court criticized the Commission for failing " . . . to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada." (R. 248.) This was not justified. The cause of action is founded on the commission of two torts: (1) Failure to establish just and reasonable rates from the international boundary line to the Carolina destinations; and (2) participating in the assessing of unjust and unreasonable through rates from the Canadian origins to the Carolina destinations which was a violation of section 1(5) of the Act (49 U. S. C. 1(5)). Commission of the tort embraced within (2) gave the Commission jurisdiction to determine the damages sustained by "Carolina Shippers." See *News Syndicate Co. v. New York Cent. R. Co., supra.*

and Newport, Vermont, to Carolina destinations to the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont. These proportional rates are nothing but a part of a through rate, for they cannot be used in any other capacity. The appellees' use of their local rates from East Alburgh and Newport, Vermont, to the Carolina destinations were also but parts of the through rate assessed and their use as such was impliedly agreed to by the appellees performing that part of the transportation service south of the **Vermont** points. In *Kansas City S. R. Co. v. C. H. Albers Com. Co., supra*, decided in 1912, discussed herein at pages 32 to 33, this Court made it plain that under such facts and circumstances the participating carriers in the through transportation service who established and maintained the local rates from East Alburgh and Newport impliedly asserted that such rates "shall be a component part of the through rate to be charged."

Had the complainants before the Commission restricted their complaints, insofar as reparation is concerned, to an allegation that these local rates from East Alburgh and Newport, Vermont, to the Carolina destinations were unjust and unreasonable, and had the Commission found such rates were unjust and unreasonable under the Act (49 U. S. C. 1(5)), **still it would not have had jurisdiction to determine and award damages**, for that tort, standing alone, would not have been sufficient to give the Commission jurisdiction to award damages. The through rate would still have to be passed on and found unreasonable before such jurisdiction attached. See *News Syndicate Co. v. New York Cent. R. Co., supra; Great Northern Ry. Co. v. Sullivan, supra.*

The District Court interpreted *Great Northern Ry Co. v. Sullivan, supra*, as relating to proof of unreasonableness of the through rate rather than as a jurisdictional question

(R. 252). The District Court erred. The fixed rule requires that the through rate be assailed and found unreasonable by the Commission before jurisdiction attaches giving the Commission power to then determine damages flowing from the tortious act—which was the active participation in assessing through rates and charges in violation of the Act (49 U. S. C. 1(5)).

One of the principal grounds relied on by the District Court in holding that the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont, were not subject to the jurisdiction of the Commission will be found in the following statement (R. 249):

> Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

From this statement it is obvious that the District Court has completely ignored the law of joint tort feasor liability as it relates to the question of damages. It is just such participation by the carriers in the assessment of unjust and unreasonable through transportation charges which makes them liable as joint tort-feasors. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry. Co. v. Sullivan, supra;* and *Atlantic & Y. Ry. Co. v. Carolina Button Corporation, supra.*

It is submitted that under the facts and circumstances of this case and under the pleadings before the Commission —the Commission had jurisdiction to determine the reasonableness of the through rates assessed "Carolina Consumers" and award damages for violation of the Act (49 U. S. C. 1(5)).

V

THE DISTRICT COURT ERRED IN HOLDING THAT THE COMMISSION'S PREVIOUS INTERPRETATION OF THE STATUTE AS IT RELATES TO INTERNATIONAL TRAFFIC NECESSITATED SETTING ASIDE AND ANNULLING THE ORDERS ENTERED IN CONNECTION WITH DECISION OF MAY 7, 1958

The **Third** reason advanced by the District Court for setting aside and annulling the orders of the Commission entered in connection with its decision of May 7, 1958, is to the effect that the Commission is bound by previous decisions dealing with international rate adjustments.

The summarization of the **Third** reason, which begins at R. 249 and runs through R. 252, is stated by the District Court as follows:

> * * * In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States v. Leslie Salt Co.*, 350 U. S. 383, 395-97 (1956); *FTC v. Bunte Bros.*, 312 U. S. 349, 351-52 (1941).

The District court erred when it held that "* * * the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case." It should be noted that throughout the discussion of this **Third** reason, beginning with R. 249 and running through R. 252, the District Court makes no distinction between the Commission's previous administration of the Act as it relates to discrimination or as it relates to damages. Therefore it becomes necessary to deal with this error from the standpoint of discrimination and damages separately.

A. From the Standpoint of Discrimination

We have heretofore shown under Point III that the Commission has in the past ordered removal of undue preference and prejudice found to exist in international rate adjustments.

In the instant case the Commission entered two statutory findings relating to undue preference and prejudice.

First, the Commission found that the rates on the asbestos commodities from the Canadian mines to destinations in official territory and the Carolinas were unduly prejudicial to complainants and unduly preferential of their competitors to the extent that the rates to the considered Carolina destinations exceeded the rates to Ambler, Pennsylvania, and destinations taking the same rates by certain designated differentials (R. 77). Second, the Commission found that the rates on the asbestos commodities from Danville and other Canadian origins to destinations in official territory and Carolina destinations were unduly prejudicial to the complainants and unduly preferential of their competitors to the extent that the rates to the Carolina destinations failed to reflect differentials under the rates from the Quebec Central mines to Ambler, Pennsylvania, and destinations taking the same rates (R. 77, 78). It will be noted that the Commission did not attempt to regulate the through rates from the Canadian origins to the Carolina destinations; and neither did they attempt to regulate the single factor joint rates from the Canadian origins to the official territory destinations. The Commission simply held that the rates to the Carolina destinations, insofar as transportation took place in the United States, for the future, could not exceed rates maintained by the appellees from the Canadian origins to Ambler, Pennsylvania, and related destinations in official territory. In the case of tariff rates from the district mines on the Canadian National Railway the Com-

mission simply held that any existing differential which existed between the rates from the Canadian National Railway mines and those from the Quebec Central Railway mines to Ambler, Pennsylvania, and related destinations should be likewise maintained to the Carolina destinations.

It cannot be argued that the appellees do not have absolute freedom, under the Commission's order, to establish a rate adjustment to Ambler, Pennsylvania, and related destinations, and employ whatever form of tariff publication they choose, and then establish rates to the Carolina destinations in accordance with the Commission's order.

This is not regulation of the rates from Canadian origins to United States points. It is regulation of the relationship of rates between destinations within the United States far removed from the international boundary line.

Even though it may be assumed, *arguendo*, that the Commission in some previous cases declined to take positive administrative action, it does not justify annulment or setting aside of Commission orders entered in subsequent cases. Incidentally it may be stated that no two cases ever presented to the Commission contained identically the same facts and circumstances when it was called upon to determine questions relating to undue preference, or undue prejudice.

The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or the inconsistency of decisions which it has rendered. See *Virginian Ry. v. United States*, 272 U. S. 658, 663-666; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271.

In *Virginian Ry. v. United States, supra*, the court said (pp. 665-666):

> • • • This court has no concern with the correctness of the Commission's reasoning, with the sound-

ness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

B. **From the Standpoint of Damages**

We have shown hereinbefore under Point IV beginning at pages 34 to 42 that the Commission in 1916 laid down a fixed principle governing the disposition of complaints wherein reparation was requested for violation of section 1(5) of the Act (49 U. S. C. 1(5)). It was shown that this principle required that if damages were to be obtained, the complainant before the Commission was required to assail the through transportation charge whether that charge was based on a single factor joint rate or combination rates.

It has also been shown that the Commission failed to apply this fixed principle in the case of international rates involved in *Alberta Coal Sales Co. v. C. N. Rys., supra,* decided in 1928. The Commission granted reparation where only the domestic proportional rate was assailed and no allegation was made as to the reasonableness of the through rate from Canada, or the Canadian factor to the international boundary line. This Court in *Great Northern Ry Co. v. Sullivan, supra,* reversed the Commission and held that it did not have power under such circumstances to make an award of reparation and order the rail carriers to pay money.

It has heretofore been shown (p. 41) that the Commission in *E. A. Brown Produce Co. v. Atchison, T. & S. F. Ry. Co., supra,* decided in 1950, recognizes that reparation cannot be awarded in connection with international shipments unless the through transportation charges as a whole are assailed and found unlawful.

The cases cited by the District Court, and by the appellees before the Commission, for the most part deal entirely with reparation issues. Most of them, if not all, were

decided by the Commission prior to this Court's ruling in *Great Northern Ry. Co. v. Sullivan, supra.* Possibly in some instances certain divisions of the Commission have failed to follow the rule since 1935 and in fact very recently. Dismissal of complaints which assail through international rates and pray for reparation on the ground that the Commission does not have jurisdiction of one factor, because thereunder the transportation service was rendered in Canada, would be clearly an error of law. Such complaints should be considered on their merits and disposed of accordingly.

VI

THE COMMISSION HAS JURISDICTION UNDER THE ACT TO CONSIDER THE LAWFULNESS OF THE PROPORTIONAL RATE MAINTAINED BY THE CANADIAN CARRIERS TO EAST ALBURGH AND NEWPORT, VERMONT, AND ORDER THE REMOVAL OF ANY UNLAWFULNESS FOUND TO EXIST

The District Court erroneously turned its decisions on the jurisdiction of the Commission over the proportional rates maintained by the Canadian carriers to East Alburgh and Newport, Vermont. The lower court's statements of the question presented for decision, and its ultimate holding, reveal a totally erroneous approach in resolving the "Questions Presented" in this case.

The lower court stated:

> A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States? (R. 242.)

and concludes:

> We merely hold that the carriage of freight by rail on a proportional (fol. 298) rate from a point of origin in Canada, over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate. (R. 253.)

It will be noted from the above that the District Court emphasizes that the proportional rates applied from points of origin in Canada to a border point in the United States for the purpose of interchange. This emphasis reflects the Court's finding that the Commission did not dispute the statement that there were no facilities for interchange available at the international boundary line or between the boundary line and East Alburgh and Newport; and further, that the Commission did not dispute that as to these particular proportional rates the Canadian carriers operated within the United States only for the purpose of turning over the asbestos to the American carriers (R. 247).

The appellees, defendants before the Commission, argued that it would not be practical or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh. The Commission held that it did not perceive how this would affect the situation and stated that it had jurisdiction over rail carriers to the extent that they operated within the United States (R. 75).

Appellees again raised the same contention in their petition for reconsideration dated June 13, 1958. It was stated therein that:

> The only apparent alternative the petititoners might have would be either to attempt to interchange all traffic at the exact international boundary, or to publish rates applicable to and from the exact international boundary. They have heretofore shown that

it would not be practicable or feasible to interchange traffic at the exact international boundary, but the Commission dismisses that practical consideration with the indifferent comment that it does not perceive how that would affect the situation. Neither would it be practicable to publish rates between interior points in Canada and the exact international boundary, on the one hand, and points between the exact international boundary and interior points in the United States, on the other. As the Commission well knows, the carriers rarely, if ever, publish rates for application to or from a point on a line of railroad where there are no facilities for the receipt, delivery, or interchange of traffic. Any departure from that practice could only result in complicated, confusing, and possible doubtful or ambiguous tariff provisions. If the Canadian and American carriers continue to interchange traffic at the established ports of entry under the Commission construction of the statute in order to deprive the Commission of jurisdiction in any instance where the carriers elect not to join in joint international rates, it will be necessary for them to publish rates to and from the exact boundary line. (R. 119-120.)

Appellants in their reply to the petition of June 13, 1958, stated:

The Petitioners say that the Commission is impractical and unrealistic in this case because if the decision of the Commission is to stand, the defendants would have to publish rates from the international boundary line. There is nothing whatsoever to this argument. The Commission is asked to take judicial notice of the Tariffs and certain Items which are on file at this moment with the Interstate Commerce Commission and shown herein as Appendices A, B, and C. These items show that the defendants are publishing rates from the actual international boundary line. We make no comment as to the lawfulness of these rates since we do not know at this time whether or not the said rates inherently contain two terminal charges. We

simply say that there is nothing to this argument advanced by the defendants.

We call the attention of the Commission to the fact that the Tariffs and Items shown in Appendices A and B show (fol. 250) conclusively the carriers transporting property within the United States to or from the international boundary. In the case of Derby Line, Vt., located just north of Newport, Vt., on the Quebec Central, the Items and Tariffs referred to in Appendices A and B show conclusively that it is the Quebec Central which performs the service from the international boundary line. Attention is also called to East Alburgh, Vt., which is located on the Central Vermont Railway. There it is shown that the carrier transporting the property within the United States to or from the international boundary line is the Grand Trunk-Eastern Lines.

Attention is also called to the provisions in connection with Rouses Point, N. Y. Here again it is conclusively shown that there is a transportation service performed in the United States between Rouses Point and the international boundary line.

We believe that this is a complete answer to the defendants' argument that the Commission has no jurisdiction over these Canadian lines. By their own tariffs on file with this Commission—**They Admit.** (R. 211-212.)

The District Court acknowledged that the proportional rates applied to only a portion of the transportation service being rendered over a through route (see Note 4—R. 243). Nevertheless it considers the proportional rates as being independent units of charge for independent units of service. In this it erred. It separates and divides a single unit of charge and single unit of service which are indivisible. See *Through Routes and Through Rates, supra.* "Carolina Consumers", as complainants before the Commission, did not complain merely of the aggregate of the component parts of the through rates customarily charged by the de-

fendants before the Commission for transportation service rendered by the respective lines included in the through routes. They complained of the single charge as a single unit which was assessed for a single unit of transportation service from the point of origin in Canada to the points of destination in the Carolinas. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; Through Routes and Through Rates, supra.*

As indicated in Points III and IV of this Argument, whether or not the Commission has jurisdiction over these proportional rates is immaterial in deciding the issues herein relating to discrimination or damages.

We desire, however, to deal with this phase of the District Court's decision since the proportional factors were, and are, used by the appellee carriers in constructing through rates which were, and are, being assessed "Carolina Consumers".

A. Jurisdiction of the Commission Relating to Award of Damages

This Court in *Great Northern Ry. Co. v. Sullivan, supra,* at pages 462 and 463 specifically held that the Commission may not order or permit payment of damages by way of reparation based on a finding that a proportional rate used in constructing a through rate is unjust and unreasonable. This within itself prohibits dividing the single unit of charge for a single unit of transportation service. To permit a division of the single unit of charge for the single unit of transportation service rendered would violate the rule long established by this Court and the Commission that when damages are in issue the through transportation charge must be assailed and considered.

The District Court advanced as a reason for holding that the proportional rates to East Alburgh and Newport, Vermont, were not subject to the Commission's jurisdiction

was based on the conclusion that to hold otherwise American carriers could be held liable for a portion of overcharges they had no part in formulating (R. 249).

As to this the District Court completely ignored the law of joint tort-feasor liability as it relates to damages. All participating carriers in through rates, single factor or combination, are joint tort-feasors if the through rates are found unjust and unreasonable. See *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co., supra; News Syndicate Co. v. New York Cent. R. Co., supra; Lewis-Simas-Jones Co. v. Southern Pac. Co., supra; Great Northern Ry. Co. v. Sullivan, supra;* and *Atlantic & Y. Ry. Co. v. Carolina Button Corporation, supra.*

It should be pointed out that if the appellee carriers were of the opinion that the proportional factors were responsible for any unreasonableness in the through rates, the burden was on them to come forward with proof to that effect. The complainants before the Commission had alleged unlawfulness under section 1(5) of the Act (49 U. S. C. 1(5)) and in their presentation in chief presented evidence to prove their allegation. The burden of proof shifted to the appellees; and they being unable to defend on the merits, asserted that the Commission was without jurisdiction in the premises.

B. **Jurisdiction of the Commission Relating to Rates for the Future**

The Commission has jurisdiction to determine the future lawfulness of the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont, should they be attacked. This is true both as to section 1(5) and 3(1) of the Act (49 U. S. C. 1(5) and 3(1))). Jurisdiction would arise from the fact that the Canadian National Railway Company and the Quebec Central Railway Company have failed to make and publish a rate for that part of the trans-

portation service performed between the international boundary line and East Alburgh and Newport, Vermont, respectively. This failure is a violation of the statutory duty imposed by the Act. The failure is comparable to the failure of the defendant railroads involved in *News Syndicate Co. v. New York Cent. R. Co., supra*, pages 186 and 187. Failure to comply with statutory duty does not evaporate the obligation to maintain and assess just and reasonable transportation charges for the service rendered within the boundaries of the United States.

Of course, these Canadian carriers are at liberty to publish, for future application, a rate from the mines in Canada to the international boundary line and file the same with the Canadian Commission; and in another tariff make and publish a rate for that part of the transportation service from the international boundary line down to East Alburgh and Newport, Vermont, and file the said tariff with the Interstate Commerce Commission.

The District Court seemed to be of the opinion that such publications by the Canadian rail carriers would be a useless undertaking. This overlooks the fact that these Canadian carriers, and other participating carriers in the through transportation service, are under a statutory duty to make and publish reasonable and nondiscriminatory charges from the international boundary to the Carolina destinations.

These proportional rates are in no way different than the joint rates established and maintained by the rail carriers on newsprint paper from Thorold, Ontario, to New York City. The proportional rates apply for single line application from the Canadian points to points in the United States 3 to 5 miles south of the international boundary line. Any distinction between the two factual situations would be without legal significance.

The newsprint rates referred to were those dealt with by the Commission in *Ontario Paper Co. v. C. N. Rys.*, 95 I. C. C. 66, 102 I. C. C. 365, which was under review by this Court in *News Syndicate Co. v. New York Cent. R. Co., supra.* Thorold is in Ontario on the Canadian National Railways 30 miles north of Black Rock, New York, where an interchange connection is made with the New York Central Railroad Company and other United States lines, and also 12 miles north of Suspension Bridge, New York, where interchange connection is made with the same New York Central Railroad and other United States lines. This Court held that: "No rates were made or published for the transportation from the international boundary to New York City." See Page 185 of U. S. 275. In the instant case no rates were established or published from the international boundary line to East Alburgh or Newport, Vermont. That is a certainty.

It is said that East Alburgh and Newport, Vermont, are ports of entry—well—Black Rock and Suspension Bridge, New York, are likewise ports of entry. This Court, in *News Syndicate Co. v. New York Cent. R. Co., supra,* did not say that it was the duty of the rail carriers to establish rates for that part of the transportation from the ports of entry of Black Rock and Suspension Bridge—on the contrary—it stated emphatically that it was the duty of the rail carriers under the Act to establish just and reasonable rates from the international boundary line to New York City. This Court is asked to take judicial notice of the fact that the international boundary line, separating the United States from the Dominion of Canada in the vicinity of Black Rock and Suspension Bridge, New York, is situate in the middle of the Niagara River.

In its decision of May 7, 1958 (R. 60), the entire Commission cited *Newsprint Paper to Detriot*, 161 I. C. C. 637 (Division 5), wherein at page 639 it was held:

> It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transportation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was a violation of section 6 of the act. We have under such circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom. * * *

Newsprint Paper to Detroit, supra, was decided March 8, 1930. The decision of this Court in *News Syndicate Co. v. New York Cent. R. Co., supra,* was rendered November 21, 1927. Here again Detroit, Michigan, is a port of entry and to this port of entry the Commission held that it had jurisdiction because of the failure of the Michigan Central to publish a rate for that part of the transportation service rendered from the middle of the Detroit River to Detroit.

The District Court missed entirely the purpose for which the Commission cited *Fruit Importers v. Atlantic Coast Line R. Co.*, 203 I. C. C. 139 (1934); *Newsprint Paper to Detroit, supra; Simpson Co. v. G. T. W. Ry. Co.*, 129 I. C. C. 430 (1927); *Larrowe Milling Co. v. C., W. & L. E. R. R.*, 52 I. C. C. 145 (1919); *Iron or Steel Wire, Buffalo, N. Y., to Kitchener, Ontario*, 294 I. C. C. 515 (1955) when it distinguished these cases on the ground that they involved joint rates or practices relating thereto, whereas, the instant case involves through rates made on a combination

basis."[1] This was a distinction without legal significance. The question presented is where did the Commission's jurisdiction attach. The answer is at the international boundary line.

The District Court also referred to *Status of Napierville Junction Ry. Co.*, 266 I. C. C. 471 (1946), and *Control of Hereford Ry. Co.*, 99 I. C. C. 7 (1925) (R. 250) which the Commission cited in its decision of May 7, 1958, in support of its holding that its jurisdiction attached at the international boundary line. The District Court stated that: "These * * * two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case." (R. 250.) Subsequently in the District Court's opinion (R. 252) it is stated:

> Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points. This argument is unpersuasive. **The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers.** If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 I. C. C. 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 I. C. C. 575 (1926). (Emphasis supplied.)

It will be noted from the above statement that the District Court concedes that the Commission has jurisdiction over the Canadian carriers themselves—Canadian National Railway Company and Quebec Central Railway Company—if they seek to discontinue service between the inter-

[1] The District Court said: "The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates; but were combination rates." (R. 247.)

change points and the international boundary line or if they seek to lease their trackage which is in the United States. Attention of the Court is called to the fact that section 1(18) of the Act (49 U. S. C. 1(18)) prohibits abandonment of any portion of a railroad, subject to the Commission's jurisdiction (section 1(a) and (c) 49 U. S. C. 1(a) and (c)), without first securing from the Commission a certificate of public convenience and necessity authorizing the abandonment. Section 5(2)(a) and (b) of the Act (49 U. S. C. 5(2)(a) and (b)) prohibits carriers subject to the Commission's jurisdiction from leasing any or all of their properties without first securing authority from the Commission.

Particular attention is directed to the following sentence appearing in the statement above: "The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers." There is nothing in the Interstate Commerce Act which supports the distinction made by the District Court with respect to the Commission's jurisdiction over the Canadian carriers operating in the United States in regard to abandonment or lease matters as against rate matters. We fail to find any decision of a court of competent jurisdiction, or the Commission, which makes such a distinction. It will be noted that the District Court does not cite any authority for the distinction.

The concession on the part of the District Court that the Commission has jurisdiction over the Canadian National Railway Company and the Quebec Central Railway Company, in the matter of abandonment and lease matters squares with this Court's holding in *News Syndicate Co. v. New York Cent. R. Co.*, *supra*, at pages 186 and 187, that the Interstate Commerce Act applies to the lines that carried the paper from the international boundary to New York City. The distinction made by the District Court as

to rate matters, however, is in direct conflict with this Court's holding in the case cited—same pages—that the Interstate Commerce Act applied to the rates charged for the transportation of the paper from the international boundary line to New York.

Can it be successfully argued that the Canadian National Railway Company and the Quebec Central Railway Company are not subject to the jurisdiction of the Commission **because** they published proportional rates from the Canadian origins to ports of entry 3 to 5 miles south of the international boundary line for the purpose of interchange? We do not think so.

Hearing Examiner Arnold J. Roth in his Proposed Report met such an argument head-on. He stated:

> The contentions of the defendants proceed from the assumption that the points of Newport and East Alburgh are for all practical purposes border points, and that the rates here in issue conform to the first alternative indicated above. The facts, however, indicate otherwise. East Alburgh is some 3 miles from the border, and Newport is 5 miles beyond it. The proportional rates maintained by the Canadian lines are applicable only on traffic destined to points in the United States, and they obligate these carriers to provide transportation service within the borders of the United States. Jurisdiction is not a concept governed by practical considerations, but is absolute. To the extent, therefore, that transportation within the United States under the proportional rates is performed by the Canadian lines, they are subject to the jurisdiction of the Commission. (R. 191.)

We believe that it is indisputable that the Commission, under the Act, has authority to require the Canadian National Railway Company and the Quebec Central Railway Company to establish just and reasonable, non-preferential and non-prejudicial rates from the international boundary

line to East Alburgh and Newport, Vermont. The Commission also has power to issue a cease and desist order prohibiting further participation by the appellee railroads, all of whom are subject to the jurisdiction of the Commission, in the through rates now being assessed both to destinations in official territory and to the Carolina destinations, and require the establishment of just and reasonable non-preferential and non-prejudicial rates from the international boundary line to the said areas.

If the Commission does not have this jurisdiction, then it is impotent insofar as international rates are concerned. If this impotency exists, then Congress has left the appellee railroads free to discriminate at will in connection with international shipments originating in Canada and destined to any point or area in the United States. By utilizing different forms of tariff publication they can evade their responsibilities and engage extensively in the very practices which the Interstate Commerce Act was designed to prohibit and prevent.

In *Interstate Com. Com. v. Baltimore & O. R. Co.*, 225 U. S. 326, this Court said:

> * * * Tariffs are but forms of words, and certainly the Commission, in the exercise of its powers to administer the interstate commerce act, can look beyond the forms to what caused them and what they are intended to cause and do cause.

The point under discussion is of vital interest to "Carolina Consumers" for if the Commission does not have any jurisdiction whatsoever over these proportional rates, and as an end result no jurisdiction over the through transportation charges assessed, then the appellee railroads are placed in a position to demand exorbitant rates in the form of through transportation charges and discriminate at will without intervention or hindrance from the Commission.

In *Cyanamid and Cyanide From Niagara Falls, supra,* decided in 1929, the Commission suspended certain tariff schedules proposing increased rates on cyanamid and crude cyanide, in carloads, from Niagara Falls, Ontario, Canada, to destinations in New England territory, Cincinnati, Ohio, and Virginia cities, and instituted an investigation as to the lawfulness of the proposed ncreased rates.[18] The Commission's power to suspend and institute an investigation was challenged, and it was argued that the Commission did not have jurisdiction over the proposed increased international joint rates.

It was contended by the challenging rail carriers that this Court's decision in *News Syndicate Co. v. New York Cent. R. Co., supra,* related to damages **alone** and that the Commission had been empowered to determine the reasonableness of a joint international rate **only** when the issue related to damages and not rates for the future. The entire Commission rejected the contention and stated that the advocates of such a construction of this Court's decision in *News Syndicate Co. v. New York Cent. R. Co., supra,* would add the word "only" to this Court's answer to question 1 which was answered as follows: "Yes, for the ascertainment of damages." (p. 188, 275 U. S.). The Commission held that addition of the word "only" was not justified and reasoned as follows (see p. 491 of 155 I. C. C.):

> It must be borne in mind, however, that the questions certified to the court and its answers were addressed to a suit for damages based upon a reparation order made and entered by us. The holding that the United States carriers in that case had committed a tort in failing "to make or publish any rate **applicable** to that part of the transportation" (which took place within the United States) is not conclusive that they could commit no tort in respect of a joint international rate. To find otherwise would be to free from any regu-

[18] This decision of the Commission was referred to under Point III.

lation every joint international rate now participated in by the United States lines and to render impotent our jurisdiction even over that portion of the transportation which "takes place within the United States." And this would be true not alone as to the "reasonableness" of such rates, which was the only question considered by the court, but to questions of undue prejudice and unjust discrimination as well.

If the duty of the United States carriers to publish rates to and from the international boundary, referred to by the court, is exclusive and all embracing, then it must follow that participation in a joint international rate is *ipso facto* unlawful. We do not so construe the law. Moreover, such construction would not square with the statement of the court that "Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error." It is impossible to conceive of a "just and reasonable" rate as the product of a tortious act.

The Commission held that the suspended schedules had not been justified and required their cancellation, without prejudice, to the filing of new schedules in conformity with the views expressed.

The Commission exercised jurisdiction in *Cyanamid and Cyanide From Niagara Falls, supra*, because from the record it did not appear the rail carriers involved had complied with the Act and established rates from the international boundary line to the involved destinations in the United States. The international boundary line is situate in the middle of the Niagara River between Niagara Falls, Ontario (where the shipments originated), and Niagara Falls, New York.

It is clear that the District Court erred in holding that these proportional rates were beyond the jurisdiction of the Interstate Commerce Commission for any purpose whatsoever.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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February 3, 1961.

Section 1(1)(a) and (2), (4), and (5) (49 U. S. C. 1 (1)(a) and (2), (4), and (5)).

(1) That the provisions of this part shall apply to common carriers engaged in —

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment:

* * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only insofar as such transportation takes place within the United States.

Section 1(4) and (5) (49 U. S. C. 1(4) and (5)).

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or

charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1) (49 U. S. C. 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6(1) and (7) (49 U. S. C. 6(1) and (7)).

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation.

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8 (49 U. S. C. 8).

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 13(1) (49 U. S. C. 13(1)).

(1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts:

whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 16(1) (49 U. S. C. 16(1)).

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 257

H. K. PORTER COMPANY, INC., *et al.*, Appellants,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*, Appellees.

No. 258

INTERSTATE COMMERCE COMMISSION, Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*, Appellees.

No. 286

UNITED STATES, Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE CENTRAL VERMONT RAILWAY, INC., ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 257

H. K. PORTER COMPANY, INC., *et al.*,

Appellants,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,

Appellees.

No. 258

INTERSTATE COMMERCE COMMISSION,

Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,

Appellees.

No. 266

UNITED STATES,

Appellant,

v.

CENTRAL VERMONT RAILWAY, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE CENTRAL VERMONT RAILWAY, INC., *ET AL.*

Statutes Involved

Sections 1(1)(a) and (2), 1(5) and 3(1) of the Interstate Commerce Act, Part I, 49 U.S.C. § 1(1)(a) and (2), 1(5) and 3(1), which are set forth in *Appendix A* hereof.

Questions Presented

I.

Does the Interstate Commerce Act give the Interstate Commerce Commission jurisdiction over *combination rates* legally applicable on *international traffic*, moving from origins within Canada to destinations within the United States, and over the *Canadian* and *American* railroads maintaining those rates where:

1. single line proportional rates are published solely by and for the account of the individual originating *Canadian* lines for application from the Canadian origins to United States ports of entry adjacent to the international border, and under such a rate the individual *Canadian* railroad performing the transportation within Canada carries the freight cross the international boundary to a border point within the United States for the sole purpose of interchanging it with an *American* connecting line railroad; and

2. where *local rates* are published solely by and for the account of *American* railroads to apply only to that portion of the transportation performed by them from the interchange border points within the United States to destinations within the United States;

or

under such facts and circumstances does the Interstate Commerce Act give the Interstate Commerce Commission jurisdiction only over the *local rates* published solely by and for the account of the *American* lines for application only to that portion of the transportation which they perform from the border points within the United States to destinations within the United States?

II.

If the Interstate Commerce Act gives the Interstate Commerce Commission limited jurisdiction over *combination rates* legally applicable on *international* traffic moving from origins within Canada to destinations within the United States, and over the *Canadian* and *American* railroads maintaining those rates, under the facts and circumstances stated in Question No. 1, are not the ultimate findings and the order of the Commission nevertheless invalid, and has not the Commission abused its administrative discretion?

Statement of the Case

The Central Vermont Railway, Inc., and numerous other American railroads,* operating within the United States, and the Quebec Central Railway Company and the Canadian National Railways,** operating within Canada, participate in the movement of international shipments of crude asbestos and asbestos fiber from producing points in Quebec, Canada, to consuming points in North and South Carolina. The *Canadian* railroads transport the traffic from the origins in Quebec to border points within the United States, where it is interchanged with *American* railroads for transportation to the Carolina destinations.

There are no *joint rates* published for application on the traffic. It moves under *combinations of rates* made up of single line proportional rates published by and for the account of individual *Canadian* railroads for application from the Canadian points of origin to border points within the United States, and *local rates* published solely by and for the account of *American* railroads for application only to that portion of the transportation which they

* Sometimes hereinafter referred to simply as *American* railroads.

** Sometimes hereinafter referred to simply as *Canadian* railroads.

themselves perform from the interchange border points within the United States, at which the traffic is received from Canadian connecting line railroads, to destinations within the United States.

Five complaints were filed with the Interstate Commerce Commission against the Canadian and American railroads, each of which assailed the applicable *combination rates*, alleging them to be unjust and unreasonable and unduly preferential and prejudicial, in violation of Sections 1 and 3, respectively, of the Interstate Commerce Act. Not one of these complaints assails the lawfulness of the *local rates* published solely by and for the account of American railroads for application only on that portion of the transportation which they themselves perform from the interchange border points within the United States to destinations within the United States. The prayer of each complaint asked the Commission to require the defendant railroads to establish just and reasonable rates for future application on such shipments, and to award reparation on past shipments. Because the assailed rates were *combination rates* and not *joint rates*, the railroad appellees from the very beginning of the litigation before the Interstate Commerce Commission took the position that (1) only the *American* factors applicable from the border points of interchange and the transportation performed under those factors are subject to the jurisdiction of the Commission, the lawfulness of which was not assailed in the complaints filed with the Commission, and (2) the complaints assailed rates not within the purview of the Interstate Commerce Act and were, therefore, beyond the jurisdiction of the Commission.

The Commission rejected the jurisdictional contentions of the appellees (r. 72-73) on the ground that the United States ports of entry, over which the applicable *combination rates* were made and where the Canadian and American railroads interchange this traffic, are three or five

miles south of the international boundary, and that the rates published by the Canadian railroads "obligate those carriers to provide substantial transportation service within the United States".

The Commission found the assailed rates unjust and unreasonable "in so far as the transportation takes place within the United States" (r. 76-77). "In so far as the transportation takes place within the United States", it also found the rates assailed from the Quebec origins to the Carolina destinations unduly preferential and prejudicial to the extent that they exceeded *joint rates* applicable from same origins to other points in the United States by specified amounts (r. 77-78). It further found the complainants before the Commission had been damaged and were entitled to reparation (r. 78). It ordered (r. 80-81) the *Canadian* and *American* railroads, "according as they participate in the transportation within the United States", to maintain and apply rates, regulations, and practices which will prevent and avoid the undue prejudice and preference found to exist.

On March 12, 1959, the railroad appellees instituted an action in the United States District Court for the Southern District of Vermont (r. 1) seeking the convening of a three-judge statutory court and, after hearing, the entry of a decree permanently suspending, enjoining, setting aside and annulling the orders of the Interstate Commerce Commission. On March 7, 1960, that court submitted an opinion (r. 241-253) holding "that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate". It accordingly annulled and set aside the orders of the Commission and remanded the cause for further proceedings in conformity with its opinion.

The complainants before the Commission, the Commission, and the United States are here appealing from the judgment of the District Court.

Summary of Argument

I.

Five complaints were filed with the Interstate Commerce Commission, each of which assailed the applicable *combination rates*, alleging them to be unjust and unreasonable and unduly prejudicial, in violation of Sections 1 and 3, respectively, of the Interstate Commerce Act. None of the complaints assailed the lawfulness of *local rates* published solely by the *American* railroads for application solely on that portion of the transportation which they themselves perform from interchange "border points within the United States" to Carolina destinations. The complaints asked the Commission to require the defendant railroads to establish just and reasonable rates for future application on such shipments, and to award reparation on past shipments.

Section 1(1)(a) of the Interstate Commerce Act expressly provides that the provisions of Part I thereof shall apply to *common carriers* engaged in transportation of passengers or property wholly by rail from or to any place in the United States to or from a foreign country, *but only in so far as such transportation 'takes place' within the United States.* Section 1(2) of the statute also expressly provides that the provisions of Part I shall apply to such *transportation* of passengers or property, *but only in so far as such transportation takes place within the United States.*

The appellees contend that the jurisdictional limitations appearing in the statute apply equally whether the Commission is dealing with violations alleged under Section 3(1) or under Section 1(5).

In the face of the statutory limitation on the scope and authority of the Commission, it has long since been firmly

established by the Commission and the courts that *American* railroads have a clear alternative with respect to the manner of publishing rates to apply on *international* traffic. They may elect to publish rates applicable only to that portion of the transportation which they themselves perform, in which event they are answerable only for the lawfulness of those rates, or they may participate with *foreign* carriers in the publication and maintenance of *joint rates* applicable to the entire transportation, in which event they become jointly and severally liable for any unlawfulness found in those rates.

For more than 40 years the Commission itself has held in effect that its jurisdiction over international traffic attaches at United States ports of entry within the United States on or adjacent to the international border. Throughout that entire period where such traffic moved on *combination rates* made up of foreign and domestic factors applicable to or from the ports of entry or interchange points on or adjacent to the international border, the Commission itself has treated such ports of entry or interchange points, whether they were one-half mile or twenty miles from the international boundary, as being "for all practical purposes international border points". In all such instances, with the single exception of the instant proceedings,* the Commission has consistently refused to take jurisdiction over the foreign factor applicable to or from the border point within the United States, over the foreign railroad by whom and for whose account the rate was published, or over the service performed by that carrier under such a rate within the United States between such interchange "border points within the United States" and the international boundary.

In the instant proceeding, *combination rates* apply on asbestos shipped from Quebec mines to Carolina destinations. The rates were and are made up of a *Canadian* factor, published from Canadian origins to East Alburgh

* And the possible exception of *Watab Paper Co. v. Canadian National R. Co.*, 152 I.C.C. 265, discussed by the District Court (r. 250).

and Newport, Vt., United States ports of entry located three and five miles, respectively, south of the international boundary, and *American* factors published by the *American* railroads for application from those interchange border points to the Carolina destination. The appellees have contended, and continue to contend, that by electing not to join in the establishment of *joint rates*, but by publishing *local rates* in lieu thereof applicable from the United States ports of entry or interchange border points reached by their Canadian railroad connections, "which for all practical purposes are international border points", the *American* railroads had in fact adopted the first of the two alternatives open to them, and thereby made themselves liable only for the lawfulness of the rates published by them. The Commission rejected that contention, stating that the rates maintained by the *Canadian lines* to the ports of entry within the United States "obligate them to provide substantial transportation service within the United States". It accordingly took jurisdiction over the assailed *combination rates* and made findings that those rates were unjust and unreasonable, in violation of Section 1, and prejudicial, in violation of Section 3(1), of the statute.

Upon complaint by the railroads, the District Court held that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate". The appellees are in complete accord with that holding and advance it as their principal argument before this Court.

II.

Even if the statute may be said to give the Commission limited jurisdiction over the assailed *combination rates* the ultimate findings and order of the Commission are nevertheless invalid, and the Commission must be held to have abused its administrative discretion.

None of the complaints assailed only the factor of the applicable combination rate published solely by and for the account of the American railroads for application on that portion of the transportation performed by them within the United States. The consequent failure and inability of the Commission to inquire into and determine whether not either the *local rates* of the *American* railroads or those rates plus the portion of the *Canadian factors* said to cover transportation performed by the *Canadian* carriers within the United States over which the Commission might have technical jurisdiction in and of itself invalidates the ultimate findings made by the Commission in its report of May 7, 1958.

Each of these findings is qualified by the words "in so far as transportation took or takes place within the United States"; but the report of the Commission gives no indication of the measure of the *combination rates* assailed in so far as the transportation thereunder took or takes place within the United States, and the record before the Commission contains no evidence whatever with respect thereto. In short, what the Commission did was to insert statutory language in its findings in a simple but ineffectual effort to convey the impression that it had remained within the confines of the statutory limits on its jurisdiction. The ultimate findings which the Commission made are thus invalid for the reason that they lack the necessary basic findings and evidence to support them.

The resulting order of the Commission is invalid for the reasons (1) that the findings are invalid in view of the absence of a basic finding as to the portion of the assailed rates applying to the transportation within the United States, the absence of evidence to support such a basic finding, and the absence of any complaint raising that precise issue; and (2) that it requires and directs both the *United States* and *Canadian* railroad defendants to establish, maintain, and apply for the future rates to cover the through transportation from Quebec origins to points in the United States despite the pronouncements by this Court

that the Commission may not regulate rates applicable on international traffic.

Finally, appellees contend that the abrupt departure by the Commission from a principle of more than forty years standing, only to resort to the application of that principle again six months later in another case, constitutes an abuse of discretion which renders its findings and orders herein invalid. It is appellees' contention that where, as here, the carriers have for all these years relied upon the Commission's construction of the statute and established and maintained their rates accordingly, the overturning of such settled administrative construction should be accomplished by the Commission, assuming cogent reasons exist, by resort to the rule making procedures provided for in the Interstate Commerce Act and the Administrative Procedure Act. It is their contention that the failure to resort to such procedures constitutes an abuse of discretion, which has been aggravated in the instant case by making its departure from principle retroactive through an award of reparation. That abuse of discretion has been further aggravated by the Commission's failure and refusal to give any cogent reasons for the extreme and abrupt departure from settled principle and by its reversion to that principle six months later in another case.

ARGUMENT

I.

The assailed rates are not within the purview of the Interstate Commerce Act, and are beyond the jurisdiction of the Interstate Commerce Commission.

The question which this Court is here called upon to determine is much simpler than the briefs of the appellants suggest.

Section 1(f)(a) of the statute expressly makes the provisions of Part I of that statute applicable to common

carriers engaged in the transportation of passengers or property by railroad "from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States". Section 1(2) of that statute provides that "the provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, * * *". A legislative history of these jurisdictional provisions of the statute is set forth in *Appendix B* hereof for the convenience of the Court.

Under the statute the Commission either had jurisdiction to accept the several complaints filed with it and dispose of them on their merits, or it did not.

As the report of the Commission emphasizes (r. 72), and as the District Court pointed out (r. 245), it is firmly established that *American* rail carriers have a clear alternative with respect to the manner of publishing rates applicable to *international* traffic. They may publish rates to or from the international border applicable only to that portion of the transportation which they themselves perform, in which event they are answerable only for the lawfulness of those rates, or they may join with foreign carriers and publish *joint rates* for the entire transportation, thereby assuming joint and several liability for any unlawfulness in such rates. If the appellees are correct in their contention that each of the complaints was defective on its face, and that the Commission was without jurisdiction to consider them because the *American* railroads publish and maintain rates which conform to the first of the two alternatives open to them, the judgment of the District Court (r. 253) that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination

rate," must be affirmed. The District Court held in effect that the Commission lacked jurisdiction of the subject matter of the complaints filed with it. Therefore, contrary to the allegations of the appellants, the Court was not required to do more, since any purported exercise of Commission jurisdiction under Sections 1 and 3 was void as a matter of law.

Long before the report of the Commission in the instant proceedings, as the Commission itself and the District Court both recognized (r. 72, 245), it was well settled law that *American* railroads have a clear alternative when participating in the transportation of international traffic. They may publish rates applicable to and from the border,* in which event they are answerable only for the lawfulness of the *American* factors, or they may participate in *joint* international rates, in which event they become jointly and severally liable for any unlawfulness found in those rates.

There were and are no *joint rates* published for application on the international traffic here involved. *Combination rates*, made over East Alburgh and Newport, Vt., the United States ports of entry adjacent to the international border through which this traffic moves and "which for all practical purposes are international border points",** applied and continue to apply on this traffic.

If the rates assailed in the complaints filed by the Commission were *joint rates*, there would be no question as to the limited jurisdiction of the Commission to entertain and deal with them to determine whether or not a cease and desist order should properly be entered or whether or not the complainants had been damaged by the maintenance of such rates. *Cyanamid and Cyanide from Niagara Falls,*

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* Thereby making border point *combination rates* applicable on international traffic.

** The quoted language appears in *Hoffman-Taft, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710, 712.

151 I.C.C. 207, 155 I.C.C. 488; *Lewis-Simas-Jones Co.* v. *S. P. Co.*, 283 U. S. 654. Even in such instances the Commission is without jurisdiction to *regulate* rates. But they were not *joint rates*. In this instance the American railroads elected not to participate in *joint rates*. Instead they published rates for application from the United States ports of entry, "which for all practical purposes are international border points", to the involved destinations, and none of the complaints assails the lawfulness of those *local rates*. That election, the appellees respectfully submit, conformed to the first of the two alternatives available to *American* railroads participating in the transportation of international traffic, and automatically limited the jurisdiction of the Commission to a consideration, in proper proceedings, of the lawfulness of the *American* factors. The Commission rejected that contention on the ground that East Alburgh and Newport, Vt., are three and five miles, respectively, south of the international boundary, and the rates maintained by the Canadian lines to those points "obligate those carriers to provide substantial transportation service within the United States".

The Commission is a creature of the statute and its powers are derived solely therefrom. Admittedly, the provisions of the statute give the Commission authority over common carriers by railroad engaged in the transportation of property, and over the transportation of that property, insofar as such transportation takes place within the United States. The appellees respectfully submit that the law with respect to the limitation of the Commission's power is still clear, having been dealt with particularly in two decisions of this Court, both written by the late Mr. Justice Butler.

The first of these cases was *News Syndicate Co.* v. *N. Y. C. R. R.*, 275 U. S. 179. It was a reparation case only and involved *joint* international rates. It did not involve rates for the future. The question there was whether or not the Commission had jurisdiction on a complaint made

against United States railroads alone to determine the reasonableness of a joint rate applicable from an origin in Canada to a destination in the United States. This Court there held that the Interstate Commerce Act applied to the lines that carried and to the transportation of the traffic from the international border to the destination there involved; that it was the duty of the United States railroads to establish just and reasonable rates for the service, which they had failed to do; that their failure to do so contravened the provisions of the Act and compelled the complainant before the Commission to pay the through charges complained of; and that the Commission had jurisdiction to determine whether the complainant was entitled to an award of damages, and, in the ascertainment of damages, jurisdiction to determine the reasonableness of the charges exacted. Since the Court held that the breach of the carriers' statutory duty to do so was the proximate cause of the complainant's injury, it seems fairly certain that this Court would have ruled exactly to the contrary had the United States railroads published and maintained rates applicable from the international border in that case.

The second case was *Lewis, etc. Co.* v. *Southern Pac. Co.*, 283 U. S. 654. It also was a case involving reparation only, in which a *joint* international rate was assailed as being unreasonable. The United States railroads had published and maintained a rate on the involved traffic from the international border to a destination within the United States, although that rate was not applicable on the international traffic involved in that proceeding. The defendant railroad contended (p. 659) that the Commission had not found that rate unjust, unreasonable or otherwise unlawful, and that the Commission had no jurisdiction to order the defendant to pay any reparation or damages. This Court held (p. 659), as it had in the *News Syndicate* case, that the Commission had jurisdiction to determine the reasonableness of the *joint* international rate which

actually applied on the traffic involved in that case. However, this Court there held that the Interstate Commerce Act does not empower the Commission to prescribe or regulate *joint* international rates, but that it applies to international commerce only insofar as the transportation takes place within the United States. It held that the Act applied to the transportation of the traffic there involved from the boundary to destination, and required the defendant to establish just and reasonable rates for that service, rendering the defendant liable for damages resulting from its failure to do so. The Court stated (pp. 661-662) that "*while the Act does not govern the joint through international rate*, the demand for reparation is grounded upon the claim that the maintenance of that rate participated in by the *American* carrier and its violation of the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate". (Italics added).

The Commission itself has repeatedly cited either or both of those cases for the proposition that the United States railroads have a clear alternative of either publishing rates to and from the international border, in which event they are answerable only for the lawfulness of those rates, or of participating in *joint* rates, in which event they become jointly and severally liable for the lawfulness of those *joint* rates.

The legal principle regarding the making of rates on international traffic was first enunciated in *Black Horse Tobacco Company* v. *I.C. R.R. Co.*, 17 I.C.C. 588, decided February 17, 1910. It was restated and reaffirmed in *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, 490, as follows:

> "The interstate commerce act, from which we derive our powers, by its terms is applicable to transportation 'from or to any place in the United States to or from a

foreign country,' and to common carriers engaged in such transportation, 'but only in so far as such transportation takes place within the United States.' Manifestly our jurisdiction must be so limited, for Congress could not confer upon us jurisdiction in respect of transportation wholly within a foreign country."

and then, after referring to the decision of the Supreme Court in *News Syndicate Co.* v. *N.Y.C. R.R.*, 275 U. S. 179, the Commission continued (pp. 491-492) as follows:

"If the duty of the United States carriers to publish rates to and from the international boundary, referred to by the court, is exclusive and all embracing, then it must follow that participation in a joint international rate is *ipso facto* unlawful. We do not so construe the law. Moreover, such construction would not square with the statement of the court that 'Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error.' It is impossible to conceive of a 'just and reasonable' rate as the product of a tortious act.

"We adhere to the view first expressed in *Black Horse Tobacco Co.* v. *I.C. R.R. Co.*, 17 I.C.C. 588, that the United States lines have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates. Or, they may become parties to *joint rates covering the entire transportation*, in which event they become jointly and severally liable for any unlawfulness in such rates. We have jurisdiction over the United States carriers. We have jurisdiction over a portion of the transportation. If in such circumstances the United States carriers enter into a *joint* undertaking *and participate in a rate which is an entity*, in respect of such transportation, we entertain no doubt that our control over them empowers us to require them

to cease and desist from participating in an existing *joint* rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility.

"There is a further and compelling reason why we should not surrender the jurisdiction we have heretofore exercised in respect of the participation of United States carriers in *joint* international rates. That jurisdiction has become established as the result of a long line of decisions. In *Black Horse Tobacco Co.* v. *I.C. R.R. Co.*, supra, decided February 17, 1910, the first case in which we considered the legal responsibility of United States carriers in respect of *joint* international rates, we said:

> 'Clearly, we have no authority to establish a rate of transportation in Mexico; nor to order the maintenance of a rate for the future from a point in the United States to a point in Mexico; but we may require the American carriers to cease and desist from continuing to apply a *joint* through rate, or any rule, regulation or practice in connection with that *joint* through rate, and we may, where such rate has been voluntarily maintained, inquire whether it has been reasonable, and if found unreasonable, award damages in that behalf.'

"Pursuant to that decision we have on numerous occasions either declared our power to require or have actually entered orders requiring United States carriers to cease and desist from participation in international rates which we have found to be unlawful." (Italics added)

For more than forty years the Commission has held in effect that its jurisdiction over international traffic at-

taches at ports of entry or exit within the United States. Throughout that entire time, except in the single instance which is the cause of this litigation, where international traffic moved on *combination rates* made up of factors applicable to ports of entry or interchange points on or adjacent to the international border, the Commission has refused to construe the statute as conferring jurisdiction upon it over the transportation between the international border, on the one hand, and the ports of entry or exit or interchange points adjacent to the international border, on the other. It has consistently exercised jurisdiction in such cases only over that portion of the transportation covered by *the American factors of combination rates applicable wholly within the United States*. It has consistently refused to take jurisdiction over the *Canadian factor* even though that factor of the *combination rate* obligated the *Canadian* railroad to handle the traffic to or from the United States port of entry or exit. A digest of such cases is contained in *Appendix C* hereof. Even in *joint* rate situations the Commission has refused to take jurisdiction over Canadian railroads, and the transportation they performed, when those railroads interchanged the traffic at points within the United States adjacent to the international border. A digest of such cases is contained in *Appendix D* hereof.

Such has been the interpretation of the statute with respect to the matter of jurisdiction by the Commission itself, and for more than forty years the railroads have relied upon that construction and interpretation of the statute, as they had an absolute right to do. As the District Court said (r. 252), that consistent interpretation ought not to be set aside either by the courts or by the Commission without a strong showing to justify a departure therefrom.

In rejecting the jurisdictional contention advanced by the railroads, the Commission stated (r. 273) that the Act "applies to all common carriers by railroad to the extent

that such transportation takes place within the United States", and (r. 275) that it has "jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication".

In annulling and setting aside the Commission orders, the District Court pointed out (r. 247) that the Commission made no finding that the *local rates* south of the interchange points were unreasonable or prejudicial, but nevertheless held that it had power to review the entire transportation charge because the interchange occurred within the United States, and quoted the stated position of the Commission in its decision (r. 248).

The Court thereupon observed that "although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada", pointing out that "unless the rate of the foreign carrier is left to regulation by the foreign country the phrase 'but only insofar as such transportation takes place within the United States' will be drained of all meaning", adding that "the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge".

The Court also observed (r. 249) that "if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating".

The Court further observed (r. 249) that "the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holdings support its present position", citing cases. The Court added that "not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination international rate". It pointed out (r. 252) that "the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case", and stated that "this consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure".

Finally, the District Court observed (r. 252) that "the Commission argues that unless we accept its present interpretation there will be left an unregulated 'no-man's-land' between the international boundary and the interchange points", an argument the Court found unpersuasive.

This Court should hold that the *American* carriers, having elected not to join in the establishment of *joint rates* for application on the international traffic here involved and having published rates from *border points within the United States* applicable only to that portion of the transportation which they themselves performed, are responsible only for, and the jurisdiction of the Commission is limited to a consideration of, the lawfulness of those rates.

II.

Even if the statute gives the Interstate Commerce Commission limited jurisdiction, the ultimate findings and the order of the Commission are nevertheless invalid, and the Commission has abused its administrative discretion.

A. The Commission's Ultimate Findings Are Invalid.

The failure and inability of the Commission to inquire into and determine the portion of the *Canadian* rate factor applying to *the transportation within the United States* performed by the Canadian railroads over which the Commission might have technical jurisdiction in and of itself invalidates the ultimate findings made by the Commission in its report of May 7, 1958 (r. 61-78).

Each of the ultimate findings appearing in that Commission's report is qualified by the words "insofar as the transportation took or takes place within the United States" or "insofar as the transportation takes place within the United States." However, as the plaintiffs have alleged in their complaint (r. 1, 8) in the court below, the report of the Commission does not set forth the measure of the combination rates assailed insofar as transportation thereunder took or takes place within the United States. Nor does the record in the proceedings before the Commission contain any evidence showing the measure of the assailed combination rates applying to the portion of the transportation that takes place within the United States. As a matter of fact, none of the complaints in the proceedings before the Commission alleges that the assailed combination rates were and are unlawful only insofar as transportation thereunder took or takes place within the United States. Those allegations are admitted (paras. 8 and 9) in the answers interposed by the defendants and the intervening defendants (r. 230, 236-237).

All that the Commission did was to resort to the simple expedient of employing the statutory language in a perfunctory attempt to show that it had remained within the statutory limits of its jurisdiction.

In *Alabama Great Southern R.R. Co.* v. *United States* (1951), 340 U. S. 216, the Supreme Court pointed out that detailed findings of fact are not ordinarily required of the Commission, and that it is sufficient if the written report discloses the essential basis of the judgment. However, the court stated:

> "Of course Sec. 14(1) does not relieve the Commission of the duty to make the 'basic' or 'quasi jurisdictional' findings essential to the statutory validity of the order."

In *Seatrain Lines, Inc.* v. *United States of America and Interstate Commerce Commission*, 168 F. Sup. 819, a case decided December 22, 1958, by a three judge statutory court, sitting in the Southern District of New York, a somewhat similar situation was presented. The Interstate Commerce Commission order there under attack merely contained conclusions or ultimate findings recited in the language of the statute. The court held (p. 826) that such findings are not enough in the absence of basic findings to support them, citing *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 533; *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499, 506, 510-511; *New York Cent. R. Co.* v. *United States*, D. C. Mass., 99 F. Supp. 394; *Beaumont, S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86-87.

The language used in *Florida* v. *United States* (*supra*) is particularly apposite here:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this Court has recently ad-

verted * * *, but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported." (p. 215)

In the *Seatrain* case the Court also pointed out (p. 827) that Section 4(b) of the Administrative Procedure Act, 5 U.S.C. § 1003(b), requires that in a case of "rule-making" the agency shall incorporate in any rules adopted "a concise general statement of their basis and purpose." There, as here, the case involved was a "rule-making" case* and such "concise general statement" was required. The Commission's findings in the instant case do not state the basis of the ultimate findings of the unlawfulness of the assailed combination rates "insofar as the transportation took or takes place within the United States" in compliance with the Administrative Procedure Act.

Moreover, the Commission could not lawfully make any such basic finding unless it were supported by evidence, *Int. Com. Comm.* v. *Louis. & Nash. R. R.*, 227 U. S. 88, wherein the Court stated:

"1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing

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*"Rule making" is defined in Section 2(c) as "agency process for the formulation, amendment, or repeal of a rule", and "Rule" is defined as "the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing."

testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officers, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the constitution's condemnation of all arbitrary exercise of power." (p. 91)

This prohibition against the making of findings and issuance of orders without supporting evidence is expressed in the Administrative Procedure Act thusly:

> "* * * and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party *and as supported by and in accordance with the reliable, probative, and substantial evidence.*" (Section 7(c), 5 U.S.C., § 1006.)

These appellees respectfully submit that the ultimate findings of the Commission herein are invalid for the reason that they lack basic findings and evidence to support them.

They submit that the foregoing is a clear illustration that the technical and literal construction of Section 1 of the Act was resorted to by the Commission, not for the purpose of regulating the portion of the transportation performed by the Canadian railroads within the United States under the *Canadian* factor of the *combination rate*, but for the purpose of regulating the transportation per-

formed by the Canadian lines within Canada. The prohibition against such regulation is expressed in Section 1(1)(a) and (2) of the statute, is fully and clearly recognized by the Commission itself in the long line of cases discussed in Appendices C and D of this brief dealing with both joint and combination rate situations, and is expressed in clear and concise language by the Supreme Court in *Lewis, Etc. Co.* v. *Southern Pac. Co.* (*supra*), 283 U. S. 654, 659-660, and in *U. S.* v. *Pennsylvania R. Co.*, 323 U. S. 612, 620-621.

B. The Order of the Commission Is Invalid.

The order is invalid for the reasons (1) that the findings are invalid in view of the absence of a basic finding as to the portion of the assailed rates applying to the transportation within the United States, the absence of evidence to support such a basic finding, and the further absence of any complaint raising that precise issue; and (2) that it requires and directs both the *United States* and the *Canadian* railroad defendants to establish, maintain and apply for the future rates applying to transportation from points in Canada to points in the United States.

The first ordering paragraph of the order dated May 7, 1958 (r. 81), directs "the defendants named in the complaints, according as they participate in the transportation within the United States" to cease and desist "from practicing the undue prejudice and preference referred to in the preceding paragraph hereof": Thus the findings and order do not run against the American lines alone.

The cease and desist paragraph of the order does enjoin the Canadian lines, directly or indirectly to take action necessary to make effective the finding in the case. The fact of the matter is the *Canadian* carriers are ordered by this paragraph to take affirmative action with respect to the factor of the combination rate applying from the *Canadian* origins to the port of entry. The requirement

is not limited to that infinitesimal portion of the transportation within the United States, just as the findings are not limited to that portion of the transportation within the United States.

If there is any doubt concerning the attempted regulation of rates applicable to the entire transportation, the second ordering paragraph removes that doubt. That paragraph reads:

> "*It is further ordered*, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph thereof."

The first paragraph recites the finding of undue preference and prejudice and refers to the report for the "extent" of the undue preference and prejudice. The "rates, regulations, and practices" which the defendants are required and directed to establish and maintain are, therefore, those set forth in the ultimate findings appearing in the report of May 7, 1958 (r. 76-78). Those findings are to the effect that the rates from the Canadian origins to the North and South Carolina destinations are and will be unduly prejudicial to complainants, and unduly preferential to the complainants' competitors in Official Territory, to the extent that the rates assailed exceed or may exceed the rates to Ambler, Pa., and destinations taking the same rates, by specified amounts.

The end result is that the *Canadian* and the *United States* defendants must either reduce the rates to the North and South Carolina destinations or increase the rates to

Official Territory destinations. In either case, the rates that are required to be established and maintained by the *Canadian* and *United States* railroad defendants are rates intended by the Commission to apply to the *entire transportation* from the origins in Canada to the destinations in the United States, and *not to any particular portion thereof.*

There can be no question but that the order requiring the Canadian and United States defendants to establish, maintain and apply either lower rates on the traffic involved in the complaints before the Commission or higher rates on the traffic from the same Canadian origins to destinations in Official Territory, *in either case the rates covering the entire transportation*, is a flagrant disregard of the statutory restriction against regulation of transportation in a foreign country.

In *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.*, 113 I.C.C. 343; 120 I.C.C. 251, the Commission, recognizing the statutory prohibition against regulation of transportation within a foreign country, treated the situation there presented with extreme care by pointing out that:

> "This affirmance and the order we make effective, we may repeat, do not and can not affect, directly or indirectly, and we are not concerned with, the rates which the Canadian Pacific may elect to maintain, or which the Board of Railway Commissioners for Canada may approve or prescribe, for application to the transportation from Espanola to the Soo of either local or through traffic." (120 I.C.C. 251, 255).

In *Cyanamid and Cyanide From Niagara Falls, supra*, the entire Commission adhered to the view first expressed in *Black Horse Tobacco Co.* v. *I. C. R. R. Co., supra*, but not without some doubt as to the propriety thereof. It there held that:

> "We believe the better course is to continue, as we have in the past, to exercise jurisdiction over the

participation of United States lines in existing joint rates, or the propriety of such rates proposed as a substitute for existing rates. This will be our policy until we are compelled to abandon it by a decision of a court of competent jurisdiction on the direct question." (155 I.C.C. 488, 493).

The Commission has continued on that course, uninterrupted by any decision of a court of competent jurisdiction or by the legislature. However, the Commission has never attempted, as it has in the instant case, to extend its jurisdiction to the point of regulating not only *United States* carriers but *Canadian* carriers as well, and to the point of regulating not only transportation within the United States but within a *foreign* country as well. On the contrary, the Commission has consistently held that it lacks jurisdiction over *foreign* carriers even though those lines extended into the United States and carried the freight into the United States to ports of entry on or adjacent to the international boundary. Insofar as concerns *combination rates* made over ports of entry or exit on or adjacent to the international boundary, the Commission has uniformly held that it could consider only the *American* factor of the combination and has never before attempted to extend its jurisdiction to *Canadian* railroads, and to the *Canadian factor* that carried the freight to or from ports of entry in the United States adjacent to the international boundary.

The Commission's order herein is as novel as it is unlawful. It indicates that the Commission resorted to a technical and literal construction of Section 1(1)(a) and (2) of the statute, not for the purpose of regulating the portion of the transportation performed by the *Canadian* railroads within the United States under the *Canadian* factor of the *'combination rate'*, but for the purpose of regulating the *Canadian* railroads and the transportation that took and takes place *within Canada*. The appellees repeat that the restriction against such regulation is ex-

pressed in Section 1(1)(a) and (2) of the statute, has been clearly and fully recognized by the Commission itself in the long line of cases decided by it, and is expressed in clear and concise language by the Supreme Court of the United States in *Lewis, Etc., Co.* v. *Southern Pac. Co.* (*supra*), 283 U. S. 654, 659-660, and in *U. S.* v. *Pennsylvania R. Co.* (*supra*), 323 U. S. 612, 620-621.

C. The Commission Abused Its Discretion.

The plaintiffs firmly believe that for more than forty years the Commission has correctly construed and applied the jurisdictional provisions of Section 1(1)(a) and (2) of the statute with respect to *combination rates* on *international* traffic made over ports of entry or exit on or adjacent to the international border. They believe that this "settled administrative construction is entitled to great weight and should not be overturned except for cogent reason". *New York N. H. & H. R. Co.* v. *Interstate Commerce Comm.*, 200 U. S. 361, 401; *Logan* v. *Davis*, 233 U. S. 613, 627; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *Interstate Commerce Comm.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178. Particularly is this so where, as here, the carriers have for all these years relied upon the Commission's construction of the statute and established and maintained their rates in this manner. *U. S.* v. *Chicago North Shore R. Co.*, 288 U. S. 1, 13-14.

However, there is an element of discretion involved in this case, not discretion to apply or not to apply an established construction, but the discretion the Commission may possess in the form and procedure to be applied in the administration of the statute.

For many years the carriers have so constructed their tariffs as to make their *combination rates* applicable from or to the ports of entry or exit on or adjacent to the international border. That is evident from the many Commis-

sion cases referred to herein. It has become a rule of action, a practice engaged in by the railroads serving the ports of entry or exit, and one which the shipping public has accepted. The situation is somewhat analogous to one where the Commission had established a regulation or practice within its jurisdiction which, having been in effect for some time, had become a rule of action which entered into the business dealings of the country. In that situation, no change in the regulation or practice could be made effective, except upon notice to all who would be affected thereby, and a right accorded them to be heard in the matter. The procedure to be followed in such instances is expressly set forth in the Administrative Procedure Act, which is designed to insure and protect the rights of interested persons against arbitrary action by administrative agencies, including the Interstate Commerce Commission.

Had the Commission resorted to the rule-making procedures of the Administrative Procedure Act to effectuate a change in the carriers' manner of publishing and maintaining *combination rates* on *international* traffic, all interested persons would have been given notice with a description of the subject and issues involved, and a statement of the terms or substance of the proposed rule. Sec. 4(a), Administrative Procedure Act (5 U. S. C., § 1103 (a)). They would have been afforded an opportunity to participate in the rule-making proceeding, and the Commission, after consideration of all relevant matter presented, would have been required to incorporate in any rules adopted "a concise general statement of their basis and purpose." Sec. 4(b), Administrative Procedure Act.

That procedure is not without precedent in a situation of the kind involved in the case at bar.

Publication of Rates between United States and Canada (1928), 147 I.C.C. 778, was instituted by the Commission on its own motion following the decision of the Supreme Court in the *News Syndicate* case. The procedure fol-

lowed by the Commission was substantially the procedure provided for in the Administrative Procedure Act. The Commission presented certain questions which arose from a consideration of the *News Syndicate* case "as to the effect of that decision upon existing practices in the publication of rates between points in the United States and points in Canada." It instituted the proceeding "in order that the Commission may be fully advised in the matter" and "to accord all interested parties an opportunity to file printed briefs, to be supplemented by oral argument, with respect to the general subject matter, including the legal problems involved, as well as considerations affecting practical traffic applications." The report indicates that appearance were made on behalf of numerous shippers and associations, and by numerous railroads, who presented briefs and participated in the oral argument. It was concluded that nothing should be done which would result in bringing about a cancellation of *joint rates* then in force and applicable to the transportation of traffic from and to points in the United States to and from points in Canada and Mexico. The Commission arrived at this conclusion because it thought it would "best serve the interests of all concerned by doing so, under present circumstances and conditions."

The interpretation of the statute which affects the rate situation in the case at bar is of importance to many shippers and carriers not parties to the proceedings. Nevertheless, the Commission has now undertaken to interpret Section 1(1)(a) and (2), so as to give it jurisdiction in any case where the railroads publish rates to or from ports of entry or exit adjacent to the international boundary instead of to and from the exact boundary. It has gone even further and penalized the carriers by making its departure from principle retroactive through an award of reparation.

Appellees respectfully submit that the Commission has abused its discretion in the case at bar. It has aggravated

that abuse by giving retroactive effect to its departure from principle through an award of reparation. It has further aggravated that abuse by reverting to that principle six months later in *Yellow Jacket Boat Co. Inc. v. Atchison, T. & S. F. Ry. Co.*, 302 I.C.C. 657, 305 I.C.C. 143. It has still further aggravated it by failing and refusing to give any cogent reasons for the extreme and abrupt departure from the settled administrative construction of the statute.

III.

The contentions of the appellants are without merit.

The various grounds advanced by the appellants in support of their prayer that this Court reverse the judgment of the District Court are generally those which were presented to the District Court and found lacking in merit. Not one of the three appellants has yet undertaken to meet squarely the simple but basic and fundamental contention of the appellees, which is the crux of this litigation, namely, that East Alburgh and Newport, Vt., the United States ports of entry, where the *Canadian* carriers interchanged the freight with their *American* railroad connections, although a few miles from the actual boundary line, "for all practical purposes are international border points", or as the District Court described them "border points within the United States." The election by the American lines to publish and maintain rates from those ports of entry and interchange border points, instead of joining in the establishment of *joint rates* to apply to the entire transportation, made them responsible only for the lawfulness of the domestic factors of the assailed *combination rates*, and automatically limited the jurisdiction of the Commission to a consideration of the lawfulness of those factors, to the transportation performed under those domestic rates, and over the American carriers performing that transportation.

A. The Contention of the United States.

The United States argues that the Commission had jurisdiction to enter an order requiring termination of the undue prejudice it found to exist. It argues (p. 8) that without regard for the correctness of the determination by the District Court that the Commission does not have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from points of origin to a border interchange within the United States, the Commission nevertheless acted within its jurisdiction in issuing a Section 3 order against railroads "operating in the United States". The United States argues in effect (p. 9) that the Commission's jurisdiction over the *Canadian* factor of the assailed *combination rates* may be relevant to the validity of the Commission's finding that the through *combination rates* were unreasonable, but that "insofar as the district court ruled on the validity of this finding, its ruling does not directly or indirectly affect the validity of the Commission's undue preference order". It argues that the finding that the through *combination rates* were unreasonable, and the related finding that the Carolina manufacturers are entitled to reparation, were not in issue before the District Court. This contention is an obvious attempt to circumvent the limits on the jurisdiction of the Commission fixed by Section 1 (1) (a) and (2) of the statute.

However, even assuming *arguendo* that the United States is correct in its contention (p. 8) that lack of jurisdiction as to Section 1 does not apply to the Section 3 finding, it should be pointed out that the Commission awarded reparation under its Section 1 finding, not under a Section 3 finding. The record before the Commission would not support a reparation award under Section 3, since it does not contain the proof of special damage essential to support an award of reparation under Section 3.

The perfectly obvious answer to the arguments of the United States is that they beg the basic question. The

Commission either had jurisdiction to accept the several complaints filed with it and to dispose of them on their individual merits, or it did not. If, as the appellees contend, each of the complaints filed with the Commission was defective on its face, and assailed rates not within the purview of the Interstate Commerce Act, from which it would follow that the Commission lacked jurisdiction to entertain them, any question concerning the authority conferred upon the Commission by the provisions of Sections 1 and 3 of the Act, is entirely beside the point, and any orders issued under the purported authority of those sections, are automatically rendered null and void. On the other hand, if each of the several complaints was not defective on its face, and the Commission did not lack jurisdiction to dispose of them on their merits, the Commission admittedly would be acting wholly within its statutory authority in making appropriate Section 1 or Section 3 findings in these proceedings and issuing orders based on those findings.

However, the complainants before the Commission assailed *international* rates without limitation or restriction and sought the prescription of *international* rates without limitation or restriction. The statute does not give the Commission jurisdiction to prescribe or regulate such rates. *Lewis-Simas, supra.*

The argument advanced by the United States evinces a complete failure on its part to comprehend the difference between *joint rates*, on the one hand, and *combination rates*, on the other, in the case of *international* traffic. The argument also indicates a failure on the part of the United States to understand that the holding of the District Court is a jurisdictional one under Section 1(1) and (2), which necessarily embraces issues arising not only under Section 1(5) of the statute, but under Section 3(1) as well, inasmuch as the provisions of Section 1(1) and (2) are expressly made applicable to Part I in its entirety. If

the publication of rates by the *American* railroads to apply from the United States ports of entry where the Canadian railroads interchange the traffic with the American railroads, "which for all practical purposes are international border points", constituted the adoption of one of the two clear alternatives open to *American* railroads, the Commission obviously had no authority to entertain complaints assailing international *combination rates* made over those border points, or to enter any order, whether it purported to be one issued under authority of Section 1(5) or 3(1). Stated another way, before the Commission can deal with a rate situation involving alleged prejudice and preference it must have jurisdiction over the rates alleged to be prejudicial under the provisions of Section 1(1) and (2) of the statute, and for any finding or order of the Commission to be lawful it must hurdle the jurisdictional barrier set up in the statute.*

The United States cites (p. 17) *Mayo Shell Corp.* v. *Baltimore & Ohio R.R.*, 297 I.C.C. 133, and contends that the Commission there ruled, in accordance with the view which it had declared in *Cyanamid and Cyanide From Niagara Falls*, 155 I.C.C. 488, that it is empowered to act against undue prejudice caused by disparate rates for through transportation furnished in part outside the

* The Commission apparently agrees with the appellees' contention in that respect, as it admits in its brief (p. 10) that "the rail carriers operating within the United States could not be held responsible for the unlawfulness of the combination rates if, in fact, such rates applied to and from the international boundary". That admission by the Commission points up the basic issue decided by the Court below and which is here on appeal, namely, whether the publication of local rates by the *American* railroads from border points within the United States to apply only to that portion of the transportation performed by them satisfies the requirement that they publish and maintain lawful rates to or from the border, thereby making them responsible for the lawfulness of those rates only and limiting the jurisdiction of the Commission to a consideration of the lawfulness of those rates, as the Commission itself has consistently held since 1916, except in the single case of the instant proceedings.

United States. No support for such a broad and unqualified statement is to be found in the report in the *Mayo* case.

That report indicates (p. 133) that the rates to the Canadian destinations assailed in that proceeding were *combination rates* made up of factors applicable to and from "the Canadian border". The record in that proceeding shows that "the Canadian border" points were Detroit, Mich., Buffalo and Rouses Point, N. Y., each of which actually was a "border point within the United States" where the traffic was interchanged with *Canadian* carriers. After noting (p. 135) that portions of the transportation under the assailed rates occurred in Canada, and that several of the defendants were Canadian lines, the Commission held that it had jurisdiction "only over such of the transportation as takes place within the United States", and stated that its order would be "directed only against the defendant railroads engaged in such transportation". The Commission failed to take jurisdiction over the rate factors to the *Canadian* destinations, applicable from Detroit, Buffalo, and Rouses Point, the "Canadian border" points within the United States where the *American* railroads interchanged the traffic with the Canadian railroads; over the *transportation* from those "border points within the United States" to the international boundary; or over the *Canadian* railroads who performed that transportation. Although not so specifically stated in the report of the Commission in that proceeding, it seems clear that in the case of the international traffic involved therein the prejudice found to exist was in the American rate factors alone.

Since the Commission in the *Mayo* case regarded Detroit, Buffalo, and Rouses Point as "for all practical purposes international border points" and refused to take jurisdiction over the *Canadian* factors applicable beyond, but in the instant case expressly refused to regard East Alburgh and Newport, Vt., similarly, and insisted upon taking jurisdiction over the Canadian factors applicable to these border points within the United States, it is clear that the *Mayo*

case not only does not support the contentions advanced by the United States, but on the contrary lends considerable support and authority to the contentions of the appellees.

Before the Commission can make a valid Section 3 finding or issue a valid Section 3 order, it must have jurisdiction over the rates assailed as being prejudicial in violation of Section 3 of the Act. The appellees respectfully submit that the argument of the United States is wholly without merit because of its complete failure to recognize that simple fact.

B. The Arguments of the Interstate Commerce Commission.

In support of its appeal from the judgment of the lower court, the Interstate Commerce Commission argues (1) that the Commission had jurisdiction to determine the preference and prejudice issue raised by the several complaints filed with the Commission, and (2) that the District Court erred in holding the Commission lacks jurisdiction to determine under Section 1 that a combination rate on through traffic from Canadian origins to destinations in the southern states was unjust and unreasonable "insofar as the transportation took or takes place within the United States".

1. The Jurisdiction of the Commission Under Section 3(1).

The argument advanced by the Interstate Commerce Commission, that under Section 3(1) of the statute the Commission possesses jurisdiction to determine the preference and prejudice issue raised by the several complaints filed with it, is substantially the same as that advanced by the United States, to which reply has hereinbefore been made.

The Commission begins its argument (p. 13) with the contention that "the District Court completely overlooked the fact that the order of the Commission entered May 7,

1958, was an order promulgated under Section 3(1) of the Act" and "treated the matter as one arising solely under the provisions of Section 1 of the Act". Any such argument can hardly be advanced seriously.

The complaint filed in the District Court sets forth (r. 10) the grounds on which it was made, including, among others, the fact that the order of May 7, 1958, exceeded the statutory power of the Commission, is based upon errors of law, is not supported by evidence or adequate findings, and is unlawful, arbitrary, null and void, for the reasons therein set forth. The order of May 7, 1958, which the District Court annulled and set aside, was a Section 3(1) order. Although holding that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor", the Court actually held in effect that the Commission lacked jurisdiction over the subject matter of the complaints filed with it. That being the case, the District Court was required to do nothing more, since any purported exercise of Commission jurisdiction under Section 1 or Section 3 would be void as a matter of law.

Incidentally the report of the Commission made no distinction concerning its jurisdiction under Section 1(5) of the statute versus its jurisdiction under Section 3(1). The lower court made no distinction with respect to the jurisdiction of the Commission under those sections of the statute. Neither does the statute itself make any such distinction.

The arguments advanced by the Commission concerning the power allegedly conferred upon it by Section 3(1) of the statute are wholly beside the point, because they, like those of the United States, ignore the basic question concerning the jurisdiction conferred upon or withheld

from the Commission under the express provisions of Section 1(1)(a) and (2) of the statute under the facts of the instant case.

The authority of the Commission under Section 3 to deal with situations of alleged undue preference and prejudice is clear, and the various arguments advanced by the Commission as authority for its power to deal with such situations are probably correct where the rates assailed as being prejudicial, in violation of Section 3 of the Act, are clearly subject to the jurisdiction of the Commission. But before the Commission can undertake to determine whether particular rates violate the provisions of Section 3(1), it must have jurisdiction under the statute over the rates assailed as being prejudicial. If the Commission lacked jurisdiction to consider the complaints filed with it, it had no more authority to deal with an alleged Section 3 violation of the statute than it had to deal with an alleged Section 1 violation. The Commission has authority to eliminate alleged undue preference and prejudice only when the rates assailed as prejudicial, and the transportation provided thereunder, are made subject to its jurisdiction by the express provisions of the statute.

The Commission, like the United States, cites the *Mayo* case in support of its contentions with respect to the jurisdiction of the Commission under Section 3(1) of the statute. That case has hereinbefore been discussed (p. 19); and no further comment with respect thereto is here necessary.

The Commission also cites *Consolidated Mining & S. Co. of Canada* v. *N.Y.C. R. Co.*, 299 I.C.C. 231, and argues that case supports its Section 3(1) jurisdictional contentions.

As that report notes (p. 233), the rates assailed in that proceeding were two-factor combination rates. The first factor applied from Tadanac, B. C., to Chicago, Ill., over the lines of the Canadian Pacific Railway, and the Minneapolis, St. Paul & Sault Ste. Marie Railroad Company,

crossing the international border at Portal, N. D. The second factor applied from Chicago, Ill., over the lines of *American* railroads to eastern destinations in the United States. Since the *combination rates* assailed in that proceeding were made over Chicago, Ill., and not over an international border point, there was not and could not have been any question as to the jurisdiction of the Commission to determine the lawfulness of the assailed combination rates. As a matter of fact, the first factor of the assailed *combination rate* was a *joint* international rate, as were the rates involved in the *Cyanamid*, *News Syndicate*, and *Lewis-Simas* cases, *supra*. In the *Consolidated Mining* case the Commission concluded that the prejudice and disadvantage there found to exist was caused entirely by the American railroads operating east of Chicago.

It is clear, therefore, that the *Consolidated Mining* case, like the *Mayo* case, not only does not support the jurisdictional contentions advanced by the Commission, but on the contrary lends additional support to the contentions of the appellees.

Finally, there is clearly no substance to the contention of the Commission (p. 21) that the failure of the lower court to sustain the Commission's orders would frustrate the "great purposes of Section 3(1)". The only effect of the decision of the District Court is to require complaints, in instances such as those here under review, to assail the *local rates* published by the American railroads and applicable to or from border points. In such instances, if the *American* factors assailed are shown to be unjust, unreasonable, unduly preferential or prejudicial, or otherwise unlawful, the Commission clearly has both the jurisdiction and the power necessary to deal with such situations, just as it has the jurisdiction and authority necessary to deal with conventional complaints which assail interstate rates applicable wholly within the United States.

2. *The Jurisdiction of the Commission Under Section 1.*

The answer to the argument advanced by the Commission (p. 22) that the District Court was in error in holding that the Commission lacks jurisdiction to determine under Section 1 of the statute that a *combination rate* on through traffic from Canadian origins to destinations in the United States was unjust and unreasonable "insofar as the transportation took or takes place within the United States", is substantially similar to the answer to its contention as to the alleged authority of the Commission under Section 3(1) of the statute. Unless by the express terms of the statute the Commission has jurisdiction over rates assailed in complaints filed with it, the Commission is without power to deal with a rate situation alleged to be unjust and unreasonable, in violation of Section 1(5) of the statute.

Contrary to the contention and apparent belief of the Commission (p. 24), the appellees' challenge was not directed to an "order based upon Section 3(1)" simply as such. It was directed to an order issued in proceedings instituted by complaints, each of which the appellees alleged was defective on its face and purported to assail rates which the Commission lacked jurisdiction to consider under the express provisions of the statute. The contention that a Section 3 issue is properly reviewable by a three-judge court, while a reparation order is properly reviewable by a one-judge court is wholly beside the point. The argument seems to suggest that issues arising in proceedings of this kind should be made the subject of piecemeal litigation. The appellees' reply to any such contention is that the basic or fundamental issue which this Court is asked to determine has to do with the jurisdiction and authority of the Commission to enter any order in these proceedings. The appellees contend that the jurisdiction of the Commission is the same for the purpose of determining issues raised under Section 1(5) as it is for determining is-

sues raised under Section 3(1), and that any other issue is necessarily subordinate. The basic jurisdictional issue is paramount, and is as controlling with respect to the reparation aspect of the Commission's decision as it is to the prejudice aspect thereof.

In its argument dealing with the alleged merits, the Commission states (p. 25) that it had before it complaints which placed in issue "the lawfulness of the entire combination through rate", both factors of which were filed with the Commission and made applicable on the involved traffic. It points out (p. 26) that the receivers sought the prescription of lawful rates for the future, as well as reparation on past shipments.

But none of those facts conferred jurisdiction on the Commission. Only the statute can confer jurisdiction.

Neither does it avail the Commission anything to cite a rule of law (p. 26) established by the Commission as long ago as 1916, to the effect that "when a complaint involves charges applicable to a through shipment, the through rate or charge must be brought in issue and the participating carriers must be made defendants", and that "when the through rate or charge is made up of separately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof."

The Commission may very well require the observance of that rule in the ordinary case where all of the rate factors, the transportation performed thereunder, and the common carriers performing the transportation are clearly subject to its jurisdiction. But where, as here, the basic issue goes to the fundamental question of whether the Commission had jurisdiction to entertain the complaints filed with it and to deal with the rates assailed therein, the arguments advanced in support of the Commission's

position are wholly beside the point. Certainly, where the basic question goes to the very jurisdiction of the Commission, the cases cited by the Commission can hardly be said to be in point.

The Commission even errs in implying (p. 28) that in complaints involving charges on through *international* shipments through rates must be put in issue. The *News Syndicate* and the *Lewis-Simas* cases, *supra*, there cited, have heretofore been discussed and nothing more need now be said, except to point out that the Commission is in error in its apparent contention that the judgment of the District Court is in conflict with the decision of this Court in the *Lewis-Simas* case, *supra*. In that case a *joint rate* actually applied on the international traffic there involved, and the late Mr. Justice Butler, speaking for this Court, merely held in effect that the subterfuge of publishing a domestic rate for application from the border to an interior point in the United States, but which was not in fact made applicable on the international traffic, did not operate to deprive the Commission of jurisdiction to determine the reasonableness of the *joint rate* which actually applied on the international traffic for the purpose of fixing damages.

Unlike the situation in the *Lewis-Simas* case, or the *News Syndicate* case, *joint rates* were not published for application on the entire international movement here involved. The applicable rates were *combination rates* made over United States ports of entry, "which for all practical purposes were international border points", which the District Court concluded were "border points within the United States".

The Commission nevertheless contends that "to the extent that this Court in the *Lewis-Simas* case, *supra*, held the rail carriers to the applicable rate on the through shipment, it is the controlling precedent here", arguing, in tongue-in-cheek fashion, that no rate of any kind was

applicable from the international boundary, and that the appellees actually collected charges based on *combination rates* "made over interior points within the United States."

The Commission argues (p. 28) that the rule requiring that the through rate be put in issue where a complaint involves charges on through shipments has been uniformly applied to *international* traffic, citing as authority for that statement the *News Syndicate*, *Lewis-Simas* cases, *supra*, and *Great Northern Ry.* v. *Sullivan*, 294 U. S. 458. But none of these cases may be cited as authority for the statement that such a rule has been uniformly applied to *international* traffic. On the contrary, the Commission's recent decision in *Yellow Jacket Boat Co. Inc.* v. *Atchison, T. & S. F. Ry. Co.*, 205 I.C.C. 113, is proof that such is not the rule with respect to international traffic. That case will be discussed in greater detail hereafter.

The *News Syndicate* case was a reparation case only. The issue there was not whether "the through rate be put in issue"; the "through rate" in that case was a *joint rate*, and the issue was whether or not the Commission had jurisdiction to determine the reasonableness of a *joint rate* applicable from a Canadian origin to a United States destination on a complaint made against United States railroads alone.

The *Lewis-Simas* case was also one involving reparation only. There again the legally applicable rate was a *joint rate*, and there again this Court held, as it had in the *News Syndicate* case, that the Commission had jurisdiction to determine the reasonableness of the *joint* international rate, regardless of the concurrent existence of a rate published to apply from the international border to the United States destination but which was not in fact legally applicable on the international traffic.

The *Sullivan* case was likewise one which involved reparation only. In that case the issue was (p. 459) "whether the uncontroverted facts and those found by the Commis-

sion are sufficient to warrant the conclusion that he sustained damage in consequence of violation of the Act by defendant". In that case this Court, again speaking through the late Mr. Justice Butler, concluded that "the charges collected were not excessive, and confessedly the same amounts lawfully might have been collected without injury or damage to plaintiff if only the connecting carriers had imposed the charges by means of 'joint' instead of the 'combination' through rates that they did establish". Treating the applicable proportional rates as divisions of a *joint* rate, this Court held that "retention by the defendants of an undue proportion of just and reasonable charges did not damage plaintiff". Commenting on the alleged support which the Commission claimed might be found in the *Sullivan* case, the District Court stated that "a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction but rather with the consignee's proof of injury".

But the Commission can hardly point to the *Sullivan* case as a pillar of strength which supports its present contentions if for no other reason than the fact that in *Yellow Jacket Boat Co., Inc.* v. *Atchison, Topeka & S. F. Ry. Co.*, 305 I.C.C. 113, decided October 30, 1958, almost six months after its decision in the instant proceedings, the Commission undertook to interpret and distinguish the *Sullivan* case.

In that proceeding the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, destined to Denison, Texas. The rates charged for the entire transportation reflected a triple combination of rates, made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, to Detroit, Michigan, and a rate from Detroit to Denison, Texas, but the attack was directed against the domestic rate only:

After pointing out that the defendants in that case relied principally on the *Sullivan* case, the Commission said:

"In the exercise of our authority to award damages, we require that the total rate or charge within our jurisdiction be shown to exceed a reasonable maximum. Thus, in the report on reconsideration in *United States* v. *Beaumont, S.L. & W. Ry. Co.*, 301 I.C.C. 231, cited by the defendants, we found a combination rate not shown to have been unreasonable where only one factor was attacked, even though the parties had stipulated that the remaining factor was reasonable. While that action was based on the authority of the *Great Northern* case, the assailed rates were completely within our jurisdiction, the movement being entirely domestic.

"With respect to the measurement of damages on international traffic, the distinction between proportional and joint rates, on the one hand, and, on the other, local rates to and from the border, is crucial. Clearly, we have no concern with a rate published to apply on a movement wholly within Canada. As observed in *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785, 787:

'The jurisdiction of this Commission over international traffic is limited to such transportation only insofar as it takes place in the United States. We have no jurisdiction over that portion of the transportation from the international boundary to Montreal. It is well settled that railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in *joint* through rates and become jointly and severally liable for any unlawfulness found in such rates * * *. The rates here

assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points.'

"Domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and reasonable *joint* through rates. They are liable for damages sustained in consequence of their failure in that respect, *but where the complaint is against a joint through rate or a proportional rate to or from the border, there can be no recovery unless the proof is directed to the through service. This is not true, however, on international traffic where the rate in issue is a local rate so published to or from the border. A local rate is complete in itself and is not dependent for its application upon a movement to or from the border,* and in that respect differs from a proportional rate which is in nature of a division of a joint through rate. *Thus, where, as here, shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary.*" (pp. 116-117) (Italics added)

It thereupon found the assailed rates "from the border points at or near the international boundary" unjust and unreasonable. Difficult as it may be to believe in the light of the Commission's position in these proceedings, the fact is that in the *Yellow Jacket* case, decided less than six months later, the Commission took the very position with respect to its jurisdiction that the appellees have contended for from the very inception of the proceedings before the Commission in the case at bar.

Neither does it avail the Commission anything to argue (pp. 28-29) that in restricting itself to the question of whether the Commission has jurisdiction "over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange point within the United States", the District Court misconceived the rate situation before the Commission. Nothing could be clearer from the opinion of the District Court than the fact that it did not misconceive the rate situation before the Commission. It understood the rate situation perfectly, and in effect held that ports of entry, "which for all practical purposes are international border points", were in fact "border points within the United States" from which the American railroads had in fact published and maintained rates applicable to Carolina desinations. It follows that for the reasons already stated, the Commission's attempted statement of the facts and holding of the *Lewis-Simas* case are in error.

Contrary to the contention of the Commission (pp. 34-35), the fact that the Commission cases there referred to involved "*joint rates* over which the Commission's jurisdiction is conceded" was not "completely beside the point", nor was the District Court "simply confusing the the secondary question of *liability* for the establishment and maintenance of unlawful rates, with the primary issue of *jurisdiction* over transportation". It may or may not be material whether one or more than one carrier "participates in the transportation of the through traffic from origins in Canada across the international boundary to the rate break-interchange point *within the United States*", but what is material beyond any question is the issue raised by these appellees, namely, whether or not the Commission obtained jurisdiction when this international traffic was carried by rail across the boundary to a "border point within the United States" by a *Canadian* carrier under a rate published solely by and for the account of

that *Canadian* carrier and solely for the purpose of interchanging the traffic with an *American* railroad.

In this instance the *American* railroads elected not to join in the publication and maintenance of a *joint international rate*, an alternative open to them under established law. In an attempt to circumvent the statutory limitation of its jurisdiction in such a case, the Commission is here attempting to convert a *combination rate* situation into an artificial *joint rate* situation by arguing that the action of the *Canadian* lines, in publishing rates solely for their own account to apply to United States ports of entry on or adjacent to the international boundary, not only made themselves but their *American* railroad connections responsible for the lawfulness of the resulting border point *combination rates*. The *American* lines had no voice or control in fixing the measure or manner of publishing those rates, which are applicable almost wholly within Canada. They accordingly here chose to publish only *local rates*, based on their conviction that under the law they thereby made themselves responsible only for the lawfulness of the rates which they themselves published for application to the transportation which they themselves performed within the United States.

This Court should not permit the Commission to deprive the appellee *American* railroads of their lawful right to protect themselves in instances of this kind by electing not to join in the establishment of *joint international rates*, but in lieu thereof to establish rates for their own account to apply from "border points within the United States" to cover only that portion of the transportation which they themselves perform within the United States, in accordance with the consistent statutory construction made by the Commission itself for more than forty years.

To argue (p. 36) that any inconsistency in its decision in these proceedings with other decisions by the Commission does not constitute a basis for upsetting this order

of the Commission is to resort to any argument which comes to mind, however frivolous it may be, in a panicky attempt to justify something impossible of justification. Jurisdiction under the statute presents a question of law, not a question of fact, and it is not for the Commission to construe the statute in one manner on one occasion and, based on that construction, assert that it lacks jurisdiction, and then on another occasion, under similar or substantially similar facts or circumstances, construe the statute in another manner and, based on that construction, assert and exercise jurisdiction, as its whims and fancies of a particular moment may dictate. The Commission either has jurisdiction under a given set of facts and circumstances, or it does not.

In *Crelinsten, M. & Sons* v. *Railway Express Agency, Inc.* (1934), 201 I.C.C. 284, the lawfulness of *joint rates* on strawberries from Florida origins to Quebec destinations, was assailed, the United States ports of exit involved in that proceeding being "Rouses Point, N. Y., or Highgate Springs, Vt., points a few miles south of the international boundary". The Commission regarded the transportation from Florida to Rouses Point, N. Y., or *Highgate Springs, Vt.*, as all of the transportation taking place within the United States, observing that "practically all of the transportation north of Rouses Point and Highgate Springs was in Canada", and stating that "we have no jurisdiction over that portion of the transportation from the international boundary to Montreal". Actually, *the distance from Highgate Springs, Vt., to the international boundary was 3.5 miles*, or a half mile greater than the distance from the international boundary to *East Alburgh, Vt.*, one of the United States ports of entry involved in the instant proceedings. The Commission treated *Highgate Springs, Vt.*, "for all practical purposes", as the actual international boundary. Moreover, it undertook to ascertain what the measure of the assailed rate was

for that portion of the transportation which took place within the United States, something it failed to do in the instant proceedings. Although the assailed rate in the *Crelinsten* case was a *joint rate*, the Commission ascertained that if it had been published as a *combination rate*, the factor applicable from Florida origins to *Highgate Springs, Vt.*, would have been "approximately $4.13". In that case the Commission did not assert jurisdiction over the *Canadian* "factor" of $1.05, which was assumed to represent the measure of the *joint rate* applicable from *Highgate Springs, Vt.*, to Montreal, P. Q., or over the *Canadian* lines, for whose account the $1.05 "factor" was reflected in the movement from *Highgate Springs, Vt.*, to Montreal, P. Q. In that case the Commission tacitly concluded that the *Canadian* "factor" included in the *joint rate* did not obligate the *Canadian* lines "to perform substantial service within the United States". The Commission has still made not the slightest attempt to explain what "substantial transportation service within the United States" the Canadian National Railways was obligated to perform from the international boundary to *East Alburgh, Vt.*, a distance of three miles (r. 73), that the *Canadian* line in the *Crelinsten* case was not likewise obligated to provide within the United States from Highgate Springs, Vt., to the international boundary, a distance of 3.5 miles. Such wholly inconsistent and inequitable administration by the Commission of the statute creating it and granting it power is error as a matter of law.

Contrary to the contention of the Commission (p. 38), the issue presented to this Court is not whether the Commission possessed jurisdiction *under Section 1(4) of the statute* to determine the lawfulness of the assailed *combination* through rates, but whether *under the provisions of Section 1(1)(a) and (2) of the statute* the Commission had jurisdiction to entertain the several complaints filed with it and deal with them on their merits. Whether the

Commission had jurisdiction to determine the lawfulness of the assailed rates under the provisions of Section 1(4) depends upon the answer to the basic question.

Finally, the rather lengthy argument (pp. 39-44) that "liability attaches regardless of the method of rate publication" again begs the basic question of whether the Commission had jurisdiction over the *combination rates* assailed. The question of liability for the assessment of unlawful rates and charges cannot possibly be important before the determination of the basic question with respect to the jurisdiction of the Commission to find the rates assailed unjust, unreasonable or otherwise unlawful.

In any event, the true rule is set forth in detail in *United States Overseas Airlines, Inc.* v. *P-R S. Lines*, 309 I.C.C. 411, decided January 15, 1960, where the Commission said:

> "The complainant refers to the rule that if a through rate, either joint or combination, is found inapplicable or unreasonable and reparation is awarded, the order runs against the carriers collectively that participated in the transportation. *Alabama Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 197 I.C.C. 726, 727-8; affirmed, 206 I.C.C. 559, 561. *That rule has reference to shipments moving in this country, and not to international traffic moving on border-point combinations.* On *international* traffic the rule is that railroads in this country have a clear alternative with respect to their participation in such traffic. They may publish rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through rates and become jointly and severally liable for any unlawfulness found in such rates. See *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 I.C.C. 785, 787."

The *Alabama Grocery* case there cited by the Commission is one of the cases cited by the Commission in a footnote (p. 42) of its brief.

The appellees respectfully submit that the Commission has advanced no argument or justification which this Court can accept as a basis for setting aside the judgment of the District Court.

C. The Arguments of the Intervenors.

The complainants before the Commission were granted leave by the District Court to intervene in support of the defendants. In the brief filed with this Court in their behalf they submit six arguments in support of their appeal from the judgment of the District Court, each of which will be separately replied to.

1. ***The Interstate Commerce Act Does Apply From the International Border to the Interior Points in the United States.***

The appellees are in general agreement with the contention of these appellants that the statute applies from the international border to interior points in the United States. However, the basic question is what constitutes the border within the meaning of the statute, and automatically fixes the limits of the jurisdiction conferred upon the Commission by the express provisions of the statute. Stated another way, the basic question is whether United States ports of entry located a few miles from the actual international boundary, where traffic is interchanged between Canadian and American railroads, and which the Commission itself has characterized, as "for all practical purposes international border points" for more than forty years, and which the District Court concluded were "border points within the United States", are to be regarded and treated as border points within the meaning of the statute.

A directly related question is whether the publication of rates, by and solely for the account of *American* railroads, to or from such "border points within the United States", constitutes the establishment of rates to or from the international boundary, within the meaning of the statute, makes the *American* railroads responsible only for the lawfulness of those rates, and at the same time limits the jurisdiction of the Commission to a consideration of the lawfulness of those rates.

These appellants argue that the District Court was in error in holding that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate".

The appellees respectfully submit that the District Court was not in error; that the law is well established that one of the two alternatives available to *American* railroads in the transportation of *international* traffic is to publish rates to or from the international border to apply only to that portion of the transportation that they themselves perform; that for more than forty years the Commission itself has asserted that its jurisdiction attaches at United States ports of entry, interchange points, or border points on or adjacent to the international boundary; that the appellees relied on that construction of the statute by the admininstrative agency charged with administering it as they had a right to do; that as the District Court said "this consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure"; and that no such showing or justification has yet made or even attempted.

2. *There Has Been No Showing That the American Railroads Failed to Satisfy Their Statutory Duty to Establish Just and Reasonable Rates From the International Border.*

In what is essentially nothing more than a variation of the argument advanced in support of their first contention, these appellants argue that it was the statutory duty of the appellee railroads to establish just and reasonable rates from the international boundary to destinations in the United States. Here again the appellees agree with that general contention. However, these appellees insist that the *American* railroads did establish rates from the international border to interior destinations in the United States.

Accordingly their answer to this contention is substantially the same as their answer to the first contention, namely, that East Alburgh and Newport, Vt., were "for all practical purposes international border points", as the Commission has consistently treated similar ports of entry, or interchange "border points within the United States" as the District Court characterized them, and that the publication and maintenance of rates from those border points within the United States to interior points within the United States, which have not been assailed or shown to have been or to be unjust, unreasonable or otherwise unlawful, fully satisfied and continues to satisfy the statutory duty of the appellees.

3. *The Commission Lacked Jurisdiction to Determine the Lawfulness of Joint Rates to Official Territory Destinations and Combination Rates to Carolina Destinations Under Section 3(1) of the Statute.*

The argument advanced in support of this point (pp. 24-35) in reality is largely a dissertation on the subject of preference and prejudice, and the principles applied in ordinary cases arising under Section 3. The appellees would be in substantial agreement with most of what is

said if the application of those principles were being argued in proceedings in which there was no question as to the jurisdiction of the Commission to consider the alleged Section 3 violations. In the instant proceedings, however, they are principles completely unrelated to the basic issue before this Court. Therefore, this argument, like that of the United States and the Commission, appears to represent an attempt to circumvent the limits on the jurisdiction of the Commission expressly fixed by the provisions of Section 1(1)(a) and (2) of the statute.

The complaints filed with the Commission assailed *international* rates without limitation or restriction, and sought the prescription of *international* rates without limitation or restriction. As this Court held in *Lewis-Simas, supra*, the statute does not give the Commission jurisdiction to prescribe or *regulate* such rates. In *Houston, E. & W. T. R. Co.* v. *United States*, 234 U. S. 342, 356 (1914), a case cited by these appellants, this Court held that the language of Section 3 was sweeping enough to embrace all discriminations of the sort described. It qualified that statement, however, by limiting it to those discriminations "which it was within the power of Congress to condemn" and "which it had authority to reach".

Carey Mfg. Co. v. *G.T.W. Ry. Co.*, 36 I.C.C. 203, cited by the appellants (p. 25), is one of the cases which has been cited consistently by the appellees in support of, and as authority for their jurisdictional contentions. It was decided in 1915, and the rates there assailed were joint rates. As shown by the appellants (p. 25, footnote 14), the Commission took the position that its jurisdiction "attaches at the ports of entry", as these appellees have been contending from the very beginning of the litigation before the Commission. As that footnote makes clear, in that report the Commission said that "it could control the rates which the American lines charged from the 'ports of entry' in the United States to destinations in the United States, whether such rates were joint rates or separately

established rates applicable to the through transportation". Again that is exactly what these appellees have been contending repeatedly throughout this entire litigation. And, except for the instant proceedings, the appellees are still unable to find a single report of the Commission, involving traffic moving under combination rates made over United States ports of entry or exit on or adjacent to the international border, where the Commission did not take the position that it had jurisdiction only over the *factor* applicable to that portion of the transportation performed wholly within the United States from or to the ports of entry or exit, over the transportation performed by the *American* railroads under those rates, and over the *American railroads* performing that transportation. Certainly that was not true in the *Cyanamid* and *Consolidated Mining* cases cited by the appellants (pp. 26-27). Thus, like the Commission, these appellants are wholly incorrect, if not misleading, when they represent to this Court (p. 27) that "in the past the Commission has exercised jurisdiction over international through rates, be they single factor rates or rates made on a combination basis".

Intentionally or otherwise, these appellants also misrepresent the fact when they state (p. 27) that "the single factor joint rates to Official territory were brought in issue as being violative of the Act". Each of the complaints filed with the Commission assailed *combination* rates legally applicable over the entire transportation from the interior Canadian origins to the Carolina destinations. Not one of them assailed the lawfulness of the *joint* rates applicable from those interior Canadian origins to destinations in Official territory and alleged them to be too high or too low, just as none of them alleged that the *American factors* applicable from border points within the United States were unlawful.

The appellants argue (p. 29) that "undue prejudice may be inflicted as effectively by a through rate made on a combination basis as by a joint rate", but it does not

follow that the District Court was in error in pointing out that the rates which the Commission found unreasonable and prejudicial in the instant case were *combination* rates rather than *joint* rates, or that "such a distinction would be without legal significance since the Commission has power to remove unjust discrimination in both classes of cases".

On the contrary, whether the through rates here involved were *joint rates* or *combination rates made over international border points* is a fact of extremely important legal significance.

Had the *American* railroads joined in the establishment of *joint* rates, by the individual act of each participating carrier, American or Canadian defendant, they would have become jointly and severally liable thereby, and the Commission would have had jurisdiction to determine the nature and extent of the alleged unlawfulness, insofar as the transportation took place within the United States. By electing not to agree to the establishment of *joint* rates in this instance, but to publish and maintain rates to and from the United States ports of entry only, "which for all practical purposes are international border points", where the traffic was interchanged between the Canadian and American railroads, the latter made themselves answerable only for the lawfulness of those rates, and the jurisdiction of the Commission was limited to a consideration of those rates.

The legal significance was *in fact* the crucial point in *News-Syndicate Co.* v. *N.Y.C.R.R.*, *supra*, and *Lewis, Etc. Co.* v. *Southern Pac. Co.*, *supra*, in both of which the failure of the *American* carriers to publish rates from the international border constituted a violation of the provisions of the Act, and compelled the complainants before the Commission to pay the through charges complained of. The Court expressly held that the proximate cause of the losses complained of was the breach of that statutory duty to publish rates from the international boundary. More-

over, the distinction has been consistently recognized by the Commission as well in many cases involving *combination rates* made over ports of entry located on or adjacent to the international boundary, which are digested in *Appendix C*. And, of course, the distinction is reflected in the two alternatives which the Commission has consistently held the railroads possess in publishing rates for application on international traffic.

To argue (pp. 30-32) that through routes existed from the interior Canadian origins to the Carolina destinations, and that the appellees have held themselves out to render a through transportation service, and have handled cars of asbestos to the Carolinas under *combination rates*, lends no support to the basic argument here being advanced that the Commission had jurisdiction to determine the lawfulness of the single factor *joint* rates to Official territory destinations and the through rates made on a *combination* basis o rates. The existence of through routes is completely subordinate to the basic question of whether or not the appellees maintained rates which enabled the Commission to assume jurisdiction in these proceedings for any purpose, or whether by the maintenance of *local rates* to and from the border points within the United States, applicable only to the transportation performed by the *American* railroads, those railroads made themselves responsible only for the lawfulness of those rates, and automatically limited the jurisdiction of the Commission to a consideration of those rates in complaint proceedings in which the lawfulness of those rates was properly put in issue.

Moreover, in *United States* v. *Great Northern R. Co.*, 343 U. S. 562, this Court recognized the distinction as follows:

> "The Interstate Commerce Act contemplates the existence of through routes in the absence of joint rates. And this court expressly has approved the

Commission's consistent recognition of the existence of through routes whether the through rates applicable thereto are joint rates or combinations of separately established rates. As a result, *the establishment of joint rates is an act separate and distinct under the statute from the establishment of through routes.*" (pp. 572-573) (Italics added)

In a related footnote (p. 572) it added:

> "It is the duty of every carrier to establish reasonable through routes *but there is no corresponding duty to establish joint rates with other carriers.* 49 U. S. C. § 1(4). Joint rates may be established either by agreement of the carriers, 49 U.S.C. § 6(4), or by Commission order, 49 U.S.C. § 15(3)." (Italics added)

The appellants are in error in contending (p. 32) that it cannot be argued that the Commission was without jurisdiction to determine the issues under Section 3(1) of the statute because single factor joint rates were applicable to destinations in Official territory, whereas combination rates were applied to Carolina destinations, on the ground that in the case of the single factor joint rates an express agreement was involved, whereas in the case of combination rates such an express agreement was lacking. According to the appellants, in the case of the combination rates the agreement was implied.

All that the cases cited by the appellants (pp. 32-32) prove is that where a *joint rate* has not been published a *combination rate* becomes legally applicable, and that the participating carriers assert that the parts of the applicable combination rate are component parts of the through rate to be charged.

Finally, it is argued that the appellees' contention that the Commission lacked jurisdiction to order the alleged discrimination removed because *international rates* are in-

sl and that the Commission is not empowered to regulate such rates, is unsound because (1) the Commission ordered the discrimination removed through the requirement that rates to the Carolina destinations should not exceed rates published and maintained to Ambler, Pa. "by more than designated amounts", which is "regulation of the amount of the differ tial which can exist" between the assailed and the compared rates, but "is not regulation of through rates from Canada to either Official territory destinations, such as Ambler, or to Carolina destinations, such as Charlotte"; and (2) freedom from regulation of through transportation charges from Canadian origins to destinations in the United States does not imply that the appellees can discriminate at will.

In support of these contentions the appellee cites (p. 34) *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295, which obviously affords no support whatever for the contentions made under its alleged authority.

How the Commission could fix the amount of a differential to be observed by the railroads in connection with international rates applicable from interior origins in Canada to interior destinations within the United States without such action constituting the "regulation of through rates from Canada" to destinations within the United States is something the appellees simply cannot understand.

The reason the Commission had no authority in these proceedings to order the allegedly unlawful discrimination removed was because the *American* railroads elected not to join in the establishment of *joint* international rates for application on the involved traffic, but instead chose to publish *local* or *domestic* rates applicable from "border points within the United States" for application only to that portion of the transportation which they themselves

performed, and thereby made themselves responsible for the lawfulness of those *local rates* only, and automatically limited the jurisdiction of the Commission accordingly.

4. *The Commission Lacked Jurisdiction to Determine the Reasonableness of the Assailed Combination Rates for Any Purpose.*

The contentions advanced in support of this argument are without authority or substance.

The argument begins with the wholly unsupported assertion that "upon proper complaint the jurisdiction of the Commission to determine the reasonableness of international through rates applicable over through routes under section 1(5) of the Act for the purpose of awarding damages as authorized by sections 8 and 16(1) of the Act is beyond question". The limitation on the Commission's jurisdiction in that respect is absolutely clear. The single exception to that limitation is the one which gives the Commission *limited* jurisdiction, where the assailed international rate is a *joint* rate, because the *American* railroads elected to join with foreign railroads in the establishment of *joint rates* instead of publishing *local* or *domestic rates* to or from the international border. In that case the Commission has jurisdiction over the *joint international rate* solely for the purpose of determining damages, or issuing a cease and desist order.

Neither did the complaints filed with the Commission, assailing the through transportation charges, alleging that they were unjust and unreasonable, and praying damages, conform to a fixed rule of the Commission and of this Court that, where damages are claimed, the through transportation charges must be assailed and found unreasonable. The applicable rule is to be found in the *Yellow Jacket* case, *supra*, decided by the Commission approximately six months after its decision in the instant proceedings, where it said "where * * * shipments originating

at Canadian points beyond the border moved from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary".

The appellants are also in error when they contend (p. 35) that the District Court refused to apply the principle enunciated in the *News Syndicate* case, *supra*, because the through rates were made on the combination basis. It argues that in the *Sullivan* case, *supra*, this Court held that the principle announced in the *News Syndicate* and *Lewis-Simas* cases, *supra*, controlled the disposition of a case which involved through rates made on a combination basis. It has heretofore been shown that the issue in the *Sullivan* case was "whether the uncontroverted facts and those found by the Commission are sufficient to warrant the conclusion that he sustained damage in consequence of violation of the Act by defendant", and that this Court merely held that "retention by the defendant of an undue proportion of just and reasonable charges did not damage plaintiff". As the District Court observed (r. 252), "a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury".

The appellants point to the decision of this Court in *Louisville & N. R. Co.* v. *Sloss-Sheffield S. & I. Co.*, 269 U. S. 217, and the statement therein that "the shipper's only interest is that the joint rate be reasonable as a whole". They contend (p. 38) that an argument that this basic principle is not applicable when a question of reparation is involved in connection with through *international* shipments would be without merit. The appellants have heretofore argued that the through rates involved in that case and the *Sullivan* case, *supra*, "were in fact joint through rates even though they were constructed on a so-called combination basis".

The decision in the *Sloss-Sheffield* case indicates (p. 231) that the rates there involved were *joint rates*, while the decision in the *Sullivan* case indicated (p. 459) that the rates there involved were *combination rates*. This Court disposed of that contention in *U. S.* v. *Great Northern R. Co.*, *supra*, wherein it held that the establishment of *joint rates* is an act separate and distinct under the statute from the establishment of through routes, and that, while it is the duty of every carrier to establish reasonable through routes, there is no corresponding duty to establish *joint rates* with other carriers.

These appellants, like the Commission itself, contend (p. 38) that in finding the through rates unjust and unreasonable and awarding damages, the Commission administered the statute according to a rule laid down in *Stevens Grocer Co.* v. *St. L., I. M. & S. Ry. Co.*, 42 I.C.C. 396. The reply made to that contention by the Commission applies equally here.

To argue (p. 41) that it is firmly established that the Commission's jurisdiction to award reparation is the same whether the shipments involved are domestic or *international* is to ignore the clear holdings of this Court and the Commission itself on that point. The Commission certainly has authority under the statute to award reparation on *domestic* traffic in a proper proceeding and upon a proper record. But the authority of the Commission to award reparation on *international traffic* is special and limited. It exists only where the *American* railroads have breached their statutory duty to maintain just and reasonable rates and charges to or from the international border. By virtue of that breach the Commission is given *limited* jurisdiction to determine the reasonableness of legally applicable *joint* rates and the damage occasioned by reason of the failure of the *American* railroads to publish and maintain just and reasonable rates to or from the international border. Moreover, the report of the Commission

in the *Yellow Jacket* case, *supra*, one of the most recent decisions of the Commission in a case of this kind, completely denies the validity of this contention.

These appellants contend (p. 41) that an argument that their complaints to the Commission should have assailed only the *local* rates from East Alburgh and Newport, Vt., would be without merit because this Court and the Commission have consistently held that "insofar as reparation is concerned the through rate must be assailed and found unreasonable by the Commission before reparation can be awarded".

The *News Syndicate* case, *supra*, is cited as the case in which this Court so held. That case has hereinbefore been discussed in detail, and it is only necessary to point out here that nothing in that case may be said to be a holding by this Court that "the through rate must be assailed and found unreasonable by the Commission before reparation can be awarded".

In the case of the Commission, that contention is refuted by its decision in the *Yellow Jacket* case, *supra*. In that case the Commission specifically held (p. 117) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It there found that the assailed rates "from *the border points on or near the international boundary*"* were unreasonable and awarded reparation. This decision denies the contention of the appellants (p. 42) that had the complainants assailed only the local rates from East Alburgh and Newport, Vt., to the Carolina destinations, the Commission would not have had jurisdiction to determine and award damages, and neither the *News Syndicate* nor the

* Italics supplied.

Sullivan case there cited may properly be cited as authority for that contention. Moreover, contrary to the contention of these appellants, the District Court did not interpret the *Sullivan* case, *supra*, "as relating to proof of unreasonableness of the through rate rather than as a jurisdictional question". What the District Court said was (r. 252) that this Court "there was not dealing with the Commission's jurisdiction but rather with the consignee's proof of injury".

Finally, these appellants argue (p. 43) that the District Court's observation that "if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overchages that they had no part in formulating", makes it obvious that "the District Court has completely ignored the law of joint tort feasor liability as it relates to the question of damages". The appellants argue that it is just such participation by the carriers in the assessment of unjust and unreasonable through transportation charges, which makes them liable as joint tort feasors, citing several cases as authority for that contention. Obviously, the question of liability is completely subordinate to the basic issue of whether or not the Commission had jurisdiction and authority to find the assailed *combination rates*, including the *Canadian* factors, unreasonable. If the Commission lacked jurisdiction to find the assailed rates unjust and unreasonable, there could be no question as to damages.

The significance of the observation of the District Court, to which this argument is directed, concerned itself with a situation in which the foreign factor of an international *combination rate* might be unjust and unreasonable and found to be so, but under the principle of the decision of the Commission in the instant proceedings the *American* carriers would nevertheless be liable "for a portion of overcharges that they had no part in formulating."

The appellees respectfully submit that, contrary to the contention of these appellants, the Commission lacked jurisdiction to determine the reasonableness of the assailed *combination rates* for any purpose.

5. *The District Court Did Not Hold That Prior Statutory Interpretations Relating to International Traffic "Necessitated" the Setting Aside and Annulling of the Commission's Orders.*

The appellants argue (p. 44) that one of the reasons the District Court set aside and annulled the Commission's orders was that the Commission was "bound by previous decisions dealing with international adjustments". The District Court was not in error in its discussion and summary of the third observation contained in its decision (r. 249-252). It is the appellants themselves who are in error in the argument they make with respect to this particular point.

The District Court analyzed the factual situation very carefully. It pointed out (r. 247) that the rates which the Commission undertook to find unlawful were *combination rates*, that the *Canadian* carriers "operate within the United States only for the purpose of turning over" the traffic to *American* railroads, that the Commission had made no finding that the "local rates south of the interchange points published by the American railroads were unreasonable or prejudicial", but that the Commission nevertheless "held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred within the United States".

The District Court set aside and annulled the Commission orders because it concluded (r. 253) that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United

States as will give the Commission jurisdiction over the foreign factor of the combination rate". In short, the District Court upheld the contentions of the appellees that the Commission was without jurisdiction to review the entire transportation charge from Quebec origins to Carolina destinations under the facts and circumstances established by the record before the Commission in these proceedings.

All that the Court was doing in that portion of its opinion which is here alleged to have been error was pointing out, not only that the cases cited by the Commission itself did not support its decision, but that, on the contrary, the Commission was in error when it stated that its prior holdings supported its report. The District Court pointed out that "the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case". The District Court did not say that because of its prior reports the Commission could not in this case make a contrary finding. What it did say was that "this consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure". No such showing had been made and, as a matter of fact, no such showing has been attempted even yet.

The appellants argue (p. 44) that the fact that "the District Court makes no distinction between the Commission's previous administration of the Act as it relates to discrimination or as it relates to damages", makes it necessary to deal with that alleged error from the standpoint of discrimination and damages separately. There is no substance or merit to that argument. The District Court concluded in effect that the Commission lacked jurisdiction to consider the entire transportation charge, and having decided that basic fact the District Court was required to do no more, since any purported exercise of jurisdiction by the Commission under Section 1(5) or Section 3(1) would be void as a matter of law.

In arguing that the courts are not concerned with the correctness or with the consistency of inconsistency of the Commission's decisions, these appellants, like the United States and the Commission, fail or refuse to recognize the vital distinction between *joint international rates* and *combination rates* made over international border points, and the decisive effect thereof on the jurisdiction of the Commission depending upon the nature of the rates assailed. Where something is as crucial as the fundamental question of jurisdiction, the Court must be concerned with the correctness of the Commission's interpretation and treatment of the jurisdictional provisions of the statute. As these appellees have consistently contended throughout this litigation, the Commission has jurisdiction in all instances of this kind; or it lacks jurisdiction in all instances of this kind. The determination of that basic jurisdictional question, of course, has application both from the standpoint of alleged discrimination and from the standpoint of damages.

6. *The Commission Does Not Have Jurisdiction Under the Statute to Consider the Lawfulness of the Canadian Factor of the Assailed Combination Rate.*

The appellants here argue (p. 48) in effect that the decision of the District Court was erroneous because it wrongfully turned on the issue of the Commission's jurisdiction over the rates maintained by the Canadian lines to East Alburgh and Newport, Vermont, the United States ports of entry and "border points within the United States" where the traffic is interchanged with *American* railroads. They argue that the District Court's statement of the issue presented for decision and the ultimate holding of that court reveal a totally erroneous approach.

This argument apparently rests on the ground that the District Court treated the *Canadian* factors of the assailed *combination rates* "as being independent units of charge for independent units of service", claiming that to be error

and further arguing that the District Court "separates and divides a single unit of charge and single unit of service which are indivisible" citing as it previously did *Through Routes and Through Rates*, 12 I.C.C. 163. The lack of substance or merit in that argument is attributable to and explained by the failure or refusal of the appellants to understand the legal significance of through routes over which *joint rates* apply versus those over which *combination rates* apply. In both *Through Routes and Through Rates, supra,* and *Thompson* v. *United States*, 343 U. S. 549, referred to at pages 30, 31, of brief of these appellants, it was made clear that the applicable rates might be either *joint rates* made by the parties to the through routes or a combination of "separately established rates, fares and charges applied to the through transportation" fixed independently by the several carriers forming the "through route". However, as the appellees have previously pointed out, carriers joining in the establishment of through routes do not thereby obligate themselves to establish *joint rates* for application thereover. And still contrary to the contention of the appellants the jurisdiction of the Commission over the *Canadian* factors of the assailed *combination rates* is essential before the Commission can decide any issue purporting to be raised by the complaints relating to discrimination or damages.

The argument the appellants make (p. 52) with respect to the "jurisdiction of the Commission relating to award of damages" is largely a repetition with slight variations of arguments made earlier in the appellants' brief.

The appellants argue that the finding of this Court in the *Sullivan* case, *supra*, prohibits the dividing of a single unit of charge for a single unit of transportation service. It argues that to permit such a division would violate a rule that when damages are in issue the through transportation charge must be assailed and considered. The answer to that contention is that the principles established by the Commission itself make it clear that the appellants are here in error. That is made clear by the report of the

Commission in the *Yellow Jacket* case, *supra*, a portion of which has hereinbefore been quoted (pp. 41-42), and in the *United States Overseas Airlines* case, a portion of which has likewise hereinbefore been quoted (pp. 47-48).

As for the belated contention that if the appellee carriers were of the opinion that the proportional factors are responsible for any unreasonableness in the through rates, the burden was on them to come forward with proof to that effect". The obvious answer to that contention is that the burden of sustaining the allegations made in the several complaints was upon the complainants and never shifted. There never was any burden on the *American* appellees to prove that the Canadian factors were unreasonable. For either the appellants or the appellees to have attempted to prove that fact before the Interstate Commerce Commission would have been a futile thing, since the Canadian Board of Transport Commissioners would be the only administrative agency which might have jurisdiction to determine the lawfulness of the *Canadian* rate factors of the assailed *combination rates*.

Neither is there any more substance or merit to the argument advanced by the appellants (p. 53) concerning the alleged "jurisdiction of the Commission relating to rates for the future."

This argument rests on the continued contention of the appellants that the Canadian lines should have published "a rate for that part of the transportation service performed between the international boundary line and East Alburgh and Newport, Vermont, respectively." The obvious answer to that contention is that the transportation service referred to "is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate" as the District Court held. It is preposterous to argue that the failure of the *Canadian* line to do that is comparable to the failure of the *American* railroads involved in the *News Syndicate* case, *supra*, to have done so. There the rail-

road defendants were *American* railroads whom this Court said had breached their statutory duty to establish lawful rates for the portion of the transportation which they performed within the United States. Here, the Canadian railroads published single line rates solely for their own account to cover transportation performed by them almost entirely within Canada. Again, contrary to the contention of the appellants (p. 54) the distinction between the two factual situations is of controlling legal significance.

In an attempt to clothe the argument otherwise wholly lacking in substance or merit with some semblance of authority, the appellants here attempt to make much of the decision of this Court in the *News Syndicate* case, *supra*, where the limited jurisdiction which this Court there held the Commission had stemmed solely from the breach of the *American* defendant railroads of their statutory duty to establish and maintain lawful rates for application from the international boundary. The appellants point out that the ports of entry involved in that proceeding were Black Rock and Suspension Bridge, New York. The appellees point out that those points are "border points within the United States" and that what the appellants have overlooked is the fact that this Court treated those points as points which for all practical purposes are international border points, just as the appellees contend the Commission should have treated East Alburgh and Newport, Vermont, in the instant proceedings.

The appellants argue (p. 56) that the District Court missed the purpose for which the Commission cited certain of its cases there referred to, when it distinguished this case on the ground that they involved *joint rates* or practices relating thereto, whereas these proceedings involved *combination rates*. In support of that contention, however, the appellants are again content to say simply that "this was a distinction without legal significance", the question being where the Commission's jurisdiction attached.

The obvious answer to that contention is the one which has been given repeatedly heretofore. In the case of *joint international rates*, the Commission obtains limited jurisdiction to consider the entire rate solely because of a breach by *American* lines of their statutory duty to publish lawful rates applicable to or from the international border, and, if the *joint international rates* assailed are found unlawful, the limited jurisdiction thus obtained by the Commission only authorizes it to issue a cease and desist order, or to award reparation. In the case of *combination rates* made over international border points, the jurisdiction of the Commission is expressly fixed by the provisions of the statute, and authorizes the Commission to consider only the lawfulness of the factor published and maintained by the *American* railroads to cover transportation which they themselves perform within the United States.

The appellants argue (p. 59) that it cannot be contended that the "Canadian National Railway Company and the Quebec Central Railway Company are not subject to the jurisdiction of the Commission because they publish proportional rates from the Canadian origins to ports of entry three to five miles south of the international boundary line for the purpose of interchange".

If, as the appellees contend and the District Court held in effect, the Commission lacked jurisdiction over the foreign factor, it makes no difference whether the Canadian lines published those rates as single line proportional rates or as local rates. In any event, the obvious answer to that contention is that for over forty years the Commission itself has taken the very position which the appellants argue cannot be taken.

Finally, the appellants argue (p. 59) that under the statute the Commission has authority to require the Canadian lines to establish rates from the international boundary from East Alburgh and Newport, Vt., and to issue a cease and desist order prohibiting further participation by the

appellee railroads in the through rates now being assessed, both to destinations in Official territory and to Carolina destinations, and to require the establishment of lawful rates from the international boundary. It argues that if the Commission does not have such power, it is impotent insofar as international rates are concerned, and the appellees are placed in a position to demand exorbitant rates in the form of through transportation charges, and to discriminate at will without intervention or hindrance from the Commission.

The obvious reply to that impotent argument is that if East Alburgh and Newport, Vt., may be considered as international border points within the meaning of the statute, each of the complaints filed with the Commission was defective on its face, and the Commission lacked jurisdiction to deal with it. On the other hand, if those points may not be considered and treated as the international border within the meaning of the statute, the contentions of these appellants with respect to the jurisdiction of the Commission would be correct in appropriate proceedings.

But even if the Commission lacks the jurisdiction claimed for it, it is preposterous to argue that the Commission is "impotent" insofar as international rates are concerned, and that the appellees are in a position to demand exorbitant rates without intervention or hindrance from the Commission. To the extent that the American appellees participate in *joint international rates*, they will be subject to the limited jurisdiction of the Commission just as they have been and presently are. To the extent that the *American* railroad appellees elect not to joint in *joint international rates* but to maintain *domestic rates* applicable only from or to the international border, the Commission will have jurisdiction over those rates, just as it heretofore had and presently has. In other words, the Commission will be no more or less "impotent" with respect to the regulation of international rates than it has been or presently is in all similar instances.

Conclusion

The appellees respectfully submit that the District Court was correct in holding that "the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate"; that none of the appellants has presented any reason which would require setting aside the judgment of the District Court; and that the judgment and order of the District Court should be affirmed.

Respectfully submitted,

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Certificate of Service

I, J. Edgar McDonald, attorney of record for the Central Vermont Railways, Inc., et al., appellees in these proceedings, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing brief on the several parties to this action, as follows:

1. On the appellants, H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, by mailing copies in duly addressed envelopes to its attorneys of record, with air mail postage prepaid, E. B. Ussery, 608 Security Federal Building, Columbia 1, South Carolina, Harvey L. Golden, Security Federal Building, Columbia 1, South Carolina, and Joseph J. Lipton, Security Federal Building, Columbia 1, South Carolina.

2. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On the United States of America, by mailing copies in duly addressed envelopes with first class postage prepaid, to its attorneys of record, Archibald Cox, Solicitor General, W. Wallace Kirkpatrick, Acting Assistant Attorney General, and Charles H. Weston, Attorney.

This 17th day of March, 1961.

J. Edgar McDonald,
466 Lexington Avenue,
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APPENDIX A

Statutes Involved

Section 1(1) (a) and (2) (49 U. S. C. § 1(1)(a) and (2)).

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

* * *

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

* * *

Section 1(5) (49 U.S.C. § 1(5)).

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Appendix A.

Section 3(1) (49 U.S.C. § 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

APPENDIX B

The Legislative History of the Jurisdictional Provisions of Section 1 of the Interstate Commerce Act*

As originally enacted by the Act to Regulate Commerce, February 4, 1887, 24 Stat. L. 379, Sec. 1 (effective April 5, 1887), the pertinent portions of Section 1 read as follows:

> "That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

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* The United States Code, Title 49, Chapter 1, contains the Interstate Commerce Act, preserving the section numbers.

Appendix B:

The Hepburn Act, June 29, 1906, 34 Stat. L. 584, Sec. 1 (effective August 28, 1906), amended the above paragraph to read as follows:

"That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

This paragraph was again amended by the Mann-Elkins Act, June 18, 1910, 36 Stat. L. 544, Sec. 7, effective August 17, 1910, to read as follows:

"That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, and to telegraph, telephone, and cable companies (whether wire or wireless) engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory, or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States or the District of Columbia, to any other State or Territory of the United States or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent

foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid, nor shall they apply the transmission of messages by telephone, telegraph, or cable wholly within one State and not transmitted to or from a foreign country from or to any State or Territory as aforesaid."

The clause in this paragraph reading:

> "and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country"

was held by the Supreme Court in *Galveston* v. *Woodbury,* 254 U. S. 358, to be inapplicable to transportation to or from adjacent foreign countries. It is there stated at page 360:

> "There is a later clause in § 1 which deals specifically with the transportation of property to or from foreign countries; but cases arising under that clause are not applicable here. That clause applies where the foreign country is *not* adjacent to the United States."

The Court in the *Woodbury* case also decided the question as to whether the Act applied to transportation "from" an adjacent foreign country to a point in the United States, the doubt arising from the fact that Section 1 expressly declared that the Act applies to "any common

carrier * * * engaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country", and made no like declaration with respect to common carriers engaged in transportation "from an adjacent foreign country to any place in the United States." The Court held:

> "A carrier engaged in transportation by rail *to* an adjacent foreign country is, at least ordinarily, engaged in transportation also *from* that country to the United States. The test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation." (pp. 359-360)

Nevertheless, Congress on February 28, 1920, amended the aforesaid provisions of Section 1 (Section 400 of the Transportation Act, 1920, 41 Stat. L. 474) to read as follows:

> "(1) That the provisions of this Act shall apply to common carriers engaged in—
>
> "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or
>
> "(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or
>
> "(c) The transmission of intelligence by wire or wireless; * * * from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the

District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation or transmission takes place within the United States.

"(2) The provisions of this Act shall also apply to such transportation of passengers and property and transmission of intelligence, but only in so far as such transportation or transmission takes place within the United States, but shall not apply—

"(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

"(b) To the transmission of intelligence by wire or wireless wholly within one State and not transmitted to or from a foreign country from or to any place in the United States as aforesaid; or

"(c) To the transportation of passengers or property by a carrier by water where such transportation would not be subject to the provisions of this act except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district."

When the Transportation Act of 1920 was under consideration in Congress, the Honorable Edgar E. Clark

Member of the Interstate Commerce Commission, appeared before the Committee on Interstate and Foreign Commerce of the House of Representatives, 66th Congress, First Session, and stated in part as follows:

> "The second change in section 1 is found at lines 12 and 13 on page 2 of the bill which makes the terms of the act applicable also to traffic 'from an adjacent foreign country to any place in the United States'.
>
> "For some reason that traffic is omitted from the provisions of the present act. It is not our thought that that will confer upon the Commission, or carry the terms of the act as applicable to jurisdiction over rates from specific places in an adjacent foreign country to places in the United States. *It is a general provision that* puts that transportation under the provisions of this act and *makes entirely clear in the statute what we have uniformly held—that we had jurisdiction of that transportation in so far as it was performed within the confines of the United States,* and that if the carriers should persist in maintaining a joint through rate which we found to be unduly prejudicial or unjustly discriminatory, we had the power to require the carrier operating within the United States to withdraw its concurrence from that joint through rate and establish a reasonable proportional or other rate for the transportation from the boundary to destination in the United States." (Hearing on H.R. 4378, beginning with p. 10, July 15, 1919.)

In *U. S.* v. *Pennsylvania R. Co.*, 323 U. S. 612, the Court had the following to say with respect to the Transportation Act of 1920:

> "This Court has stated that the 1920 Act, containing this limiting clause, 'applies to international commerce only in so far as the transportation takes place

within the United States.' *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U. S. 654, 660. The question in that case was as to joint through railroad rates over a railroad route partly in the United States and partly in Mexico. The Court further said as to this situation that 'The Act does not empower the Commission to prescribe or regulate such rates.'[9] In *St. Louis, B. & M. R. Co.* v. *Brownsville District*, 304 U. S. 295, this Court was called upon to consider whether, under the 1920 Act, there was a duty on the part of American railroads to furnish cars for transportation on a Mexican railroad. It was there held that in the absence of a discrimination against shippers, places, or classes of traffic within the United States, American railroads were 'not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico.' *These decisions simply meant that whatever power Congress might have to regulate the conduct of its domestic companies doing business abroad, it had, by the limiting provisions of the 1920 Act, expressed its purpose not to empower the Commission with general authority to regulate rail transportation in foreign countries.*" (pp. 620-621) (Italics supplied.)

These jurisdictional provisions were amended once more since 1920 but only to delete therefrom any reference to the transmission of intelligence by wire or wireless in paragraph 1 and in paragraph 2. This was accomplished on June 19, 1934, (48 Stat. L. 1102). Accordingly, paragraphs 1 and 2 of Section 1 now read and since June 19, 1934, have read as follows:

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[9] Notwithstanding this, however, the Court held that where such joint rates were voluntarily fixed and charged by an American railroad, the Commission could, under the power given it by the 1920 Act, pass upon the reasonableness of the joint international rate."

Appendix B.

"SEC. 1. (1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water; or

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

"(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States, but shall not apply—

(a) To the transportation of passengers or property or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid;

(b) or

(c) To the transportation of passengers or property by a carrier by water where such transportation

would not be subject to the provisions of this part except for the fact that such carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, any switching, terminal, lighterage, car rental, trackage, handling, or other charges by a rail carrier for services within the switching, drayage, lighterage, or corporate limits of a port terminal or district."

APPENDIX C

A Digest of cases in which the Commission declined to take jurisdiction over the foreign factor of combination rates made over "border points" within the United States.

Big Basin Lumber Co. v. S. P. Co. (1916), 37 I.C.C. 730, involved the lawfulness of rates on lumber from a point in Mexico to destinations in the United States, subject to a three-way combination rate made up a local rate to the Rio Grande River, a bridge charge, and an American factor applicable from El Paso. The Commission stated (p. 737) that it was "without power to pass upon the reasonableness of the rate from Madera to El Paso". This ruling was made despite the fact that the foreign factor of the combination rate carried the traffic across the international boundary into El Paso.

Arizona Lumber & Timber Co. v. *A.E. R.R. Co.* (1925), 96 I.C.C. 203, involved rates on lumber articles from points in the United States to points in Mexico. There the Commission treated Naco and Nogales, Arizona, as international border points. The Commission stated that the factor within the United States had not been shown to have been unreasonable, and held that it was without power to award reparation with respect to the charges accruing to the Mexican line. In short, it held itself without jurisdiction over a rate factor applying from Nogales, Arizona, to a point in Mexico, and without jurisdiction over the railroad performing that transportation.

Thannhauser & Co. v. *Southern Pac. Co.* (1929), 159 I.C.C. 747, involved combination rates on paper-bag linings from San Francisco, Calif., to destinations in Mexico. The report states:

> "A combination rate was charged, composed of a factor to Nogales, Ariz., and a factor from Nogales, Mexico, to Puga. We are without authority over the

> Mexican factor. The only question to be determined is whether the factor from San Francisco to Nogales, Ariz., was unreasonable." (p. 747)

In *Fruit Importers* v. *Atlantic Coast Line R. Co.* (1932), 188 I.C.C. 520, the Commission was asked to prescribe reasonable rates for the future on fruit from points in Florida "to Rouses Point, N. Y., and other international border crossings" on shipments destined to Montreal. The Commission stated:

> "The factor of the combination rate applicable from Rouses Point at the border to Montreal and used to make up the lowest combination basis is published and on file with us but is not subject to the provisions of the Act." (p. 524)

E. J. Stanton & Son v. *Atchison, T. & S. F. Ry. Co.* (1944), 258 I.C.C. 315, involved rates on lumber from Los Angeles, Calif., to Canadian destinations. The Commission pointed out (p. 317) that the United States factors applied to Port Huron, Detroit, Buffalo, and Rouses Point, and then stated:

> "These rates to the border points were published to apply on that part of the through transportation to destinations in Canada which takes place within the United States. Carriers may publish reasonable rates applicable to the international boundary, in which event they are answerable only for those rates. *Cyanamid and Cyandide From Niagara Falls,* 155 I.C.C. 488, 491." (p. 318)

In other words, Port Huron, Detroit, Buffalo and Rouses Point were treated, for all practical purposes, as the international boundary.

Hoffman-Taff, Inc. v. *St. Louis-S. F. Ry. Co.* (1950), 279 I.C.C. 710, involved combination rates from Canadian origins to Springfield, Mo., the first factors of which applied to Detroit and Port Huron, Michigan. The Commission stated the applicable principle and applied it thusly:

> "Under section 1 of the act, our jurisdiction applied to this transportation only insofar as it took place within the United States. It is well settled that railroads within this country have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through international rates and become jointly and severally liable for any unlawfulness found in such rates. *Cyanamid and Cyanide from Niagara Falls*, 155 I.C.C. 488. On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, *which for all practical purposes are international-border points*, applied. Only the Canadian rates, as factors of the through combinations, are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction. See, *Canada Glue Co.* v. *Canadian National Rys.*, 253 I.C.C. 801 (not printed in full)." (Italics supplied.)

In *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365, a proceeding involving northbound international traffic sub-

ject to combination rates made over Port Huron, Mich., the Commission referred to Port Huron as "*the last station in the United States on the route of movement*", and held that it might determine only the lawfulness of the factor applicable to the transportation within the United States, citing *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710. (Italics supplied.)

Elliott Packing Co. v. *Duluth, W. & P. Ry. Co.* (1954), 292 I.C.C. 12, involved rates on shipments of horses from various Canadian origins to Duluth, Minn. The report indicates that combination of rates made over the international border applied without indicating where the Canadian factor ended and the United States factor began. The Commission there stated:

> "Section 1(2) of the Interstate Commerce Act provides, in substance, that the provisions of the act shall apply to the transportation of passengers and property, but only insofar as such transportation takes place within the United States. In proceedings wherein the jurisdiction of the Commission over rates and charges on international traffic was considered, *it has been uniformly concluded* that the railroads of this country have a clear alternative in respect of their participation in such traffic. They may participate in joint rates with the Canadian railroads and thus become jointly and severally liable for any damages resulting from unlawfulness found in such rates, or they may publish reasonable and lawful rates applicable to or from the border, in which event they are answerable only for those rates. *Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry Co.*, 279 I.C.C. 710, 712; *Dow Chemical Co.* v. *Alton & S. R.*, 284 I.C.C. 365. The Commission is without power to determine the applicability or reasonableness of the rates or charges from the Canadian origins to the border points". (p. 13) (Italics supplied.)

Albee Fruit Co. v. *Atlantic Coast Line R. Co.* (1955), 293 I.C.C. 785, involved fresh fruits and vegetables from points in the South to Montreal, the applicable rates being combination rates made over Rouses Point, N. Y. Referring to Rouses Point as "the international boundary" and to the combination rates involved as being "based on border points", the Commission held:

> "The jurisdiction of this Commission over international traffic is limited to such transportation only insofar as it takes place in the United States. We have no jurisdiction over that portion of the transportation from the international boundary to Montreal. It is well settled that railroads in this country have a clear alternative with respect to their participation in international traffic. They may publish rates applicable to or from the border, in which event they are answerable only for those rates, or they may participate in joint through rates and become jointly and severally liable for any unlawfulness found in such rates. See *News Syndicate Co.* v *New York Central R. Co.*, 275 U. S. 179 and *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U. S. 654. The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points".

Endicott-Johnson Corp. v. *Akron, C. & Y. R. Co.* (1957), 300 I.C.C. 373, involved rates on hides, including certain international rates. With respect to the latter, the Commission stated:

> "Rates assailed to points in Canada are combination rates, composed of factors applicable to Northgate and Portal, N. Dak., which are international boundary points, and to factors for transportation beyond, in Canada. Our consideration must be con-

fined to the rate factors for the movements within the United States." (p. 384)

Conrad Fafard, Inc. v. *Canadian National Rys.* (1957), 302 I.C.C. 163, involved shipments of straw from Canadian origins to United States destinations. There the Commission stated:

> "The defendant Canadian National Railways appeared specially and moved that the complaints as to that carrier be dismissed for lack of jurisdiction. The shipments originated by the petitioner and by the other Canadian carrier defendant, the Canadian Pacific Railway Company, were interchanged with domestic carriers at either Port Huron or Detroit, Mich., *which interchange points have been regarded by this Commission for all practical purposes as the international boundary. Hoffman-Taff, Inc.* v. *St. Louis-S. F. Ry. Co.*, 279 I.C.C. 710. The motion is granted, and the complaints as to these carriers are dismissed." (p. 163) (Italics supplied.)

In *Yellow Jacket Boat Co., Inc.* v. *Atchison, T. & S. F. Ry. Co.*, decided January 21, 1958, 302 I.C.C. 657, the Commission was called upon to determine the lawfulness of rates on boat shapes originating at Mahone Bay, Nova Scotia, Canada, destined to Denison, Texas. The rates charged for the entire transportation reflected a triple combination of rates, made up of a factor applicable wholly within Canada from Mahone Bay, Nova Scotia, to Windsor, Ontario, a rate from Windsor, Ontario, to Detroit, Michigan, and a rate from Detroit to Denison, Texas.

In the unanimous *Report of the Commission on Reconsideration* in that proceeding*, 305 I.C.C. 113, decided Octo-

* Commissioner Arpaia was necessarily absent and did not participate in its disposition.

ber 30, 1958, the Commission made its conventional statement (p. 116) that "domestic carriers have a statutory duty to establish just and reasonable rates to and from the international boundaries, or to participate in just and reasonable *joint* through rates * * *." It stated (p. 117) that where "shipments originating at Canadian points beyond the border move on local rates from the border to destinations in this country, the complaint need not be directed to the rate on the through movement, but may be directed to the local rate or rates from the international boundary". It accordingly found that rates "from the *border points on or near the international boundary* * * *" were and for the future would be unjust and unreasonable to the extent that they exceeded or might exceed a class 50 rate "from the *international boundary near Detroit* to Denison * * *."**

** Emphasis supplied.

APPENDIX D

A digest of joint rate cases in which the Commission declined to take jurisdiction over foreign railroads and the transportation they performed on traffic interchanged with American railroads at border points within the United States

The leading Commission case on this subject is *Black Horse Tobacco Co.* v. *I. C. R.R. Co.* (1910), 17 I.C.C. Rep. 588, involving a joint rate on tobacco applicable from points in Kentucky to Monterey, Mexico. The report notes (pp. 589-590) that the shipments involved were carried by the United States carriers to Laredo, Texas, and that the Mexican railroad carried the shipment from Laredo, Texas to Monterey, Mexico. On the question of the Commission's jurisdiction to determine the lawfulness of the joint international rate for the purpose of awarding reparation, the Commission held:

> "Every carrier party to a joint rate is jointly and severally responsible for that rate. *Osborne* v. *C. & N. W. Ry. Co.*, 48 Fed. Rep., 49; *Interstate Commerce Commission* v. *L. & N. R.R. Co.*, 118 Fed. Rep., 613. Those carriers who actually participate in the transportation under a joint rate are jointly and severally liable in damages for the unreasonableness of that rate. *Nicola, Stone & Myers Co.* v. *L. & N. R.R. Co.*, 14 I.C.C. Rep., 199. Should the same rule be applied where the transportation is partly in a foreign country and where one of the carriers participating in the joint rate is a foreign railway which has not concurred in the tariff establishing that rate?
>
> "The act to regulate commerce confers jurisdiction over common carriers engaged in the transportation of persons or property from any place in the United States to an adjacent foreign country. That act further provides that 'All charges made for any service rendered or to be rendered, in the transportation

of passengers or property, as aforesaid,' shall be just and reasonable. These American carriers are therefore under requirement to impose reasonable charges for the transportation before us.

"If the American line saw fit, it might doubtless name a rate to the Mexican border, and in that event we could deal only with the service up to the Mexican line. Instead of adopting that course the American carriers, in connection with the Mexican carrier, established a joint charge for the entire service from the point in the United States to the point in Mexico, and gave no information as to the part of that charge which would accrue to the American roads. This does not relieve the American carriers from obligation to impose a reasonable charge for their service; it does make it impossible for the Commission to determine the reasonableness of that charge, except by examining the entire through rate.

"Clearly, we have no authority to establish a rate of transportation in Mexico; nor to order the maintenance of a rate for the future from a point in the United States to a point in Mexico; but we may require the American carriers to cease and desist from continuing to apply a joint through rate, or any rule, regulation, or practice in connection with that joint through rate, and we may, where such rate has been voluntarily maintained, inquire whether it has been reasonable, and if found unreasonable, award damages in that behalf." (pp. 590-591)

In *International Paper Co.* v. *D. & H. Co.* (1915), 33 I.C.C. 270, the Commission was called upon to consider the alleged unlawfulness of joint rates on pulpwood from Canadian origins to destinations in New York. The report there noted that the Delaware and Hudson Railroad received the traffic involved from its Canadian connections

at Rouses Point, N. Y., "about one mile south of the international boundary," and that the New York Central received the traffic from its Canadian connection at Massena Springs, N. Y., "*about 20 miles from the boundary line via the route of movement,*"* although the air-line distance from Massena Springs to the boundary was about six miles. The Commission stated:

> "It is well settled by numerous decisions that the extent of our authority in connection with transportation to an adjacent foreign country is over that portion of the transportation within the confines of the United States. *Black Horse Tobacco Co.* v. *I. C. R. R. Co.*, 17 I.C.C. 588; *Humboldt S. S. Co.* v. *White Pass & Yukon Route*, 25 I.C.C. 136; *Fullerton Lumber & Shingle Co.* v. *B. B. & B. C. R. R. Co.*, 25 I.C.C. 376; and *Rates on Soda Ash and Other Commodities*, 28 I.C.C. 613.
>
> * * * * *
>
> "We can not require the maintenance of joint rates from Canada into the United States nor control the charges that carriers in Canada may make for transportation services in that country. We might require the defendants to cease and desist from continuing the joint rates complained of and to establish their own rates for the service within the United States. The traffic would then move on combinations of rates."

Even though the Canadian railroads carried the traffic to Rouses Point and Massena Springs, N. Y., about 1 mile *and 20 miles*, respectively, beyond the border, the Commission declined to exercise jurisdiction over those carriers, describing that transportation as "*transportation of freight to the border.*" (Italics supplied)

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* Italics supplied.

Similarly, the Commission held in *Fairmont Creamery Co.* v. *Adams Express Co.* (1917), 43 I.C.C. 724, that it lacked jurisdiction to determine the lawfulness of joint through express rates on cream from points in Canada to "Buffalo, a port of entry", Buffalo also being the final destination. On the authority of this case, the Commission dismissed the complaint in *Booth Fisheries Co.* v. *American Express Co.* (1917), 45 I.C.C. 363, wherein a rate on fresh fish from Selkirk, Manitoba, to Buffalo, N. Y., was assailed as unlawful. The Commission there said:

> "The shipments in question moved over the lines of the Dominion Express Company to Hamilton, Ontario, thence over the lines of the American Express Company through Bridgeburg, Ontario, to Buffalo. It thus appears that this case falls within the principle announced in *Fairmont Creamery Co.* v. *Adams Express Co.*, 43 I.C.C. 724, and other cases there cited. The Commission's jurisdiction extends over that part of the transportation performed within the United States, but the facts of record do not justify a finding of unreasonableness or undue discrimination in the charges with respect to the transportation within our jurisdiction. The complaint will therefore be dismissed and an order will be entered accordingly."

Carey Mfg. Co. v. *G. T. W. Ry. Co.* (1915), 36 I.C.C. 203, involved rates on asbestos sand from Robertson, Thetford, and Sherbrooke, Province of Quebec, to Lockland and Rockdale, Ohio. The Canadian carriers carried the freight across the border to Detroit and Port Huron, Michigan. Those carriers challenged the Commission's jurisdiction to pass upon the rates complained of. The Commission held:

> "* * * we cannot prescribe joint through rates from Canada into the United States, but we can con-

trol the rates which the American lines charge from the *ports of entry* in the United States to destinations in the United States, whether they are joint rates or separately established rates applicable to the through transportation. *Our jurisdiction attaches at the ports of entry in this country.* * * *"

It thereupon stated that—

"an order will be entered requiring the *defendants subject to our jurisdiction* to establish, in lieu of the present rates, joint and local rates *from the ports of entry* which shall be no higher to Lockland or Rockdale than to Chicago or Milwaukee. * * *" (Italics supplied)

In *International Nickel Co.* v. *Director General* (1922), 66 I.C.C. 627, the Canadian carrier challenged the Commission's jurisdiction to award reparation against it for any portion of the charges which it received for the haul in Canada. Although the Canadian carrier carried the freight from Port Colborne, Ontario, across the border into the United States, interchanging it with its United States connections at Black Rock and Suspension Bridge, N. Y. the Commission nevertheless sustained the Canadian carrier's objection to jurisdiction over it by directing the United States carriers alone to pay the reparation.

With respect to the amendments to Section 1 made by the Transportation Act of 1920, the report states (p. 629):

"It is said that the amendments made by the transportation act, 1920, in section 1 of the act to regulate commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry out territorial jurisdiction up to the international boundary line, at which that of Congress itself halts. Our territorial jurisdiction as to foreign commerce is thus coextensive

with that of the federal government. No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the interstate commerce act has full effect just as the federal control act had effect when these shipments moved."

Ontario Paper Co. v. *C. N. Rys.* (1924), 95 I.C.C. 66, involved joint rates applying on newsprint paper from Thorold, Ontario, a point on the Canadian National Railways, to New York, N. Y. The report notes (p. 67) that Thorold is 30 miles from Black Rock, N. Y., and 12 miles from Suspension Bridge, N. Y., where connections are made with United States railroads.

The Commission found the assailed rates unjust and unreasonable, and awarded reparation against the United States carriers over the objections of the United States defendants.

The defendants renewed their objection to the Commission's jurisdiction in the matter, and in the *Report of the Commission on Reargument*, 102 I.C.C. 365, 367, the entire Commission ruled as follows:

"The question of our jurisdiction to award reparation on shipments from a foreign country to the United States was also touched upon in the reargument. We deem this question to be controlled by our decision in *International Nickel Co.* v. *Director General*, 66 I.C.C. 627. In view of its frequent recurrence it seems advisable to repeat our observation in that report that a review of our ruling in the courts would be desirable for future guidance. For the reasons given in our original report in the instant case we see no necessity for making separate findings concerning that portion of the transportation under consideration which is wholly within the United States."

Appendix D.

At the suggestion of the Commission its ruling was made the subject of court litigation. In *News Syndicate Co.* v. *N.Y.C.R.R.* (1927), 275 U. S. 179, the Supreme Court observed (p. 185) that the Canadian National Railways carried the traffic into the United States and interchanged it with the United States railroads at Black Rock and Suspension Bridge, N. Y. *This Court nevertheless described that transportation* (p. 187) *as "transportation from Thorold to the international boundary".*

In *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.* (1926), 113 I.C.C. 343, the Commission found joint rates on newsprint paper from Espanola, Ontario, to various destinations in the United States unreasonable and unduly prejudicial. The United States carriers were directed to cease and desist on or before a certain date and thereafter to abstain from participating in "publishing, demanding or collecting joint rates higher than those so limited."

The defendants challenged the Commission's jurisdiction to determine the lawfulness of an *international joint rate* on the ground that the order went further than to require the American lines to withdraw from any *joint rate* and publish and maintain a rate from the boundary, and that the Commission had undertaken to fix for the future a *joint international rate.* In the *Report of the Commission on Reconsideration* (1927), 120 I.C.C. 251, the Commission made it clear that it had no jurisdiction over the *Canadian railroads* despite the fact that they carried the freight across the boundary into the United States and interchanged it with the United States carriers at Sault Ste. Marie or Detroit, Mich., stating:

> "This affirmance and the order we make effective we may repeat, do not and can not affect, directly or indirectly, and we are not concerned with, the rates which the Canadian Pacific may elect to maintain, or

which the Board of Railway Commissioners for Canada may approve or prescribe, for application to the transportation from Espanola to the Soo of either local or through traffic.'" (p. 255)

In the *Report of the Commission on Further Argument in Cyanamid and Cyanide From Niagara Falls* (1929) (155 I.C.C, 488), the Canadian carrier carried the freight from Niagara Falls, Ontario, across the border to Suspension Bridge, N. Y. The Commission held:

"The interstate commerce act, from which we derive our powers, by its terms is applicable to transportation 'from or to any place in the United States to or from a foreign country', and to common carriers engaged in such transportation, 'but only in so far as such transportation takes place within the United States.' Manifestly our jurisdiction must be so limited, for Congress could not confer upon us jurisdiction in respect of transportation wholly within a foreign country." (p. 490)

"We adhere to the view first expressed in *Black Horse Tobacco Co.* v. *I.C. R.R. Co.*, 17 I.C.C. 588, that the United States lines have a clear alternative in respect of their participation in international traffic. They may publish reasonable and lawful rates *applicable* to or from the border, in which event they are answerable only for those rates. Or, they may become parties to joint rates covering the entire transportation, in which event they become jointly and severally liable for any unlawfulness in such rates. We have jurisdiction over the United States carriers. We have jurisdiction over a portion of the transportation. If in such circumstances the United States carriers enter into a joint undertaking and participate in a rate which is an entity, in respect of such transportation,

we entertain no doubt that our control over them empowers us to require them to cease and desist from participating in an existing joint rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility." (pp. 491-492)

Crelinsten, M. & Sons v. *Railway Express Agency, Inc.* (1934), 201 I.C.C. 284, involved the lawfulness of rates on strawberries from Florida origins to Quebec, the United States ports of exit being "Rouses Point, N. Y., or Highgate Springs, Vt., points a few miles south of the international boundary". The Commission regarded the transportation from Florida to Rouses Point, N. Y., or Highgate Springs, Vt., as all of the transportation taking place within the United States, observing that "practically all of the transportation north of Rouses Point and Highgate Springs was in Canada", and stating that "we have no jurisdiction over that portion of the transportation from the international boundary to Montreal". Actually, the distance from Highgate Springs, Vt., to the international boundary was 3.5 miles, yet the Commission treated it, for all practical purposes, as the actual international boundary.

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No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

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Washington 25, D.C.

JULY 1960

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the District of Vermont is reported at 182 F. Supp. 516, and is set forth in Appendix A to this statement. The order of the district court filed March 26, 1960, denying appellants' motion for reconsideration is set forth in Appendix B. The decision of the Interstate Commerce Commission dated May 7, 1958, is reported at 303 I.C.C. 743 and is set forth in Appendix C. The orders of the Commission entered May 7, 1958, and March 11, 1960, are set forth in Appendices D and E each respectively.

JURISDICTION

This action was brought under 28 U.S.C. section 1336 to set aside and enjoin enforcement of an order of the Interstate Commerce Commission. The opinion of the district court was entered on March 7, 1960, and a timely motion for reconsideration and to alter or amend the judgment was denied on March 26, 1960. The Commission filed its notice of appeal in the district court on May 24, 1960. The jurisdiction of this Court to review the judgment on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following: *Virginian Railway Company* v. *United States*, 272 U.S. 658; *St. Louis-Southwestern R. Co.* v. *United States*, 245 U.S. 136; *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627; and *New York* v. *United States*, 331 U.S. 284.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix F.

QUESTIONS PRESENTED

Asbestos moves from origins in Canada to consignees in official territory on single-factor joint through rates over the lines of Canadian and American rail carriers which meet at interchange points within the United States. Asbestos moves from the same Canadian origins and through the same interchange points to consignees in southern territory on combination through rates at a higher level consisting of (1) a proportional rate established by the Canadian carriers from the Canadian origins to the inter-

change points in the United States and (2) separately established rates of the American carriers from such interchange points to the south. The following questions are presented by this appeal:

(1) Whether the District Court erred in failing to sustain the Commission's determination that the maintenance by rail carriers operating within the United States of single-factor joint through rates to points in official territory, while maintaining combination through rates on a higher level for like service from the same Canadian origins to points in the south, were unduly prejudicial to shippers in southern territory and unduly preferential of competing shippers in official territory, in violation of section 3(1) of the Interstate Commerce Act, 49 U.S.C. sec. 3(1).

(2) Whether the District Court erred in holding that the Interstate Commerce Commission lacked power to determine the reasonableness and justness of the entire combination through rate between the Canadian origins and points in the southern territory.

STATEMENT

The Central Vermont Railway, Inc. and numerous other rail carriers, including the Quebec Central Railway Company and the Canadian National Railway Company (hereinafter referred to as the rail carriers) which operate in the United States, and which participate in the movement of crude asbestos and asbestos fiber from producing points in Canada to points in the United States, brought this action to set aside the report and order of the Commission dated

May 7, 1958, as clarified by the order of the Commission entered March 11, 1959.[1]

Crude asbestos and asbestos fiber are produced at points located in the Province of Quebec, approximately 100 miles or less north of the United States-Canadian border.[2] Asbestos is shipped from these origin points over the lines of the Quebec Central Railway Company and the Canadian National Railway Company (hereinafter called the Canadian lines) and connecting United States rail carriers to points in the United States located in official territory[3] such as Chicago, Ill., Ambler, Pa., and Manville, N.J., and to destinations in the southern territory such as Charlotte, Davidson and Marshville, N.C. and North Charleston, S.C.

The Canadian and United States rail carriers have established and maintain single-factor joint through rates[4] on asbestos from the Canadian origins to points

---

[1] The order of March 11, 1959, among other things, dispelled any doubt that the method of adjusting rates to remove the unlawful discriminations was left to the option of the rail carriers. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 650.

[2] The following producing origin points are located on the line of the Quebec Central Railway Company: Black Lake, Coleraine, Thetford Mines, Robertson and East Broughton. The following producing origin points are located on the line of the Canadian National Railway Company: Warwick, Danville and St. Malachie.

[3] Official territory, broadly speaking, lies east of the Mississippi River and north of the Potomac and Ohio Rivers. *Class Rate Investigation, 1939*, 262 I.C.C. 447, 457.

[4] A joint rate is a rate which extends over the lines of two or more carriers and is made by arrangement or agreement between the carriers and is evidenced by concurrence or power of attorney.

in official territory. Asbestos moving from the same Canadian origins to destinations in southern territory is treated differently, ratewise, by the rail carriers. Through shipments of asbestos to points in the southern territory move on combination through rates [5] composed of the following factors: (1) a proportional rate [6] restricted to apply only on traffic destined to points in the United States, published by the Canadian carriers from the origin points in Canada to East Alburgh and Newport, Vt., both of which are customs ports of entry; and (2) class rates or commodity rates [7] maintained by the United States carriers to points in southern territory such as Charlotte, Davidson and Marshville, N.C. and North Charleston, S.C. East Alburgh and Newport are located three and five miles south of the international boundary, respectively.

The proceeding was instituted before the Commission by shippers located in North and South Carolina,

[5] The term "through rate" is construed to mean the total rate from point of origin to destination. It may be a local rate, a joint rate, or a combination of separately established rates. (49 C.F.R. 141.0 (5) Regulations of the I.C.C. for the Filing of Freight Rate Schedules.

[6] A "proportional rate" is a part of a through rate, *Hocking Valley Ry. Co.* v. *Lackawanna Coal & Lumber Co.*, 224 Fed. 930, 931, and is a rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies, (2) a subsequent transportation from a point to which the proportional rate applies, (3) or both, cf. *Addy* v. *Michigan Central R. Co.*, 269 I.C.C. 685, 686.

[7] "Class rates" are rates that apply on several classes of traffic specified in the controlling classification or published exceptions thereto. A *commodity rate* is published to apply on a specific commodity or group of commodities, generally described in the tariff containing the rate, as distinguished from a class rate. *New York* v. *United States*, 331 U.S. 284, 290, fns. 1–3.

who are engaged in the manufacture, sale and distribution of asbestos products and who are adversely affected by this rate disparity.[5] Their complaints before the Commission alleged: (1) that the rates charged by the rail carriers for the transportation of crude asbestos and asbestos fibre from the Canadian mines to the southern destination points were and are unreasonable and unjust in violation of sections 1 and 2 of the Interstate Commerce Act (49 U.S.C. sections 1 and 2); and (2) that the rail carriers violated section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)) by the maintenance of unduly prejudicial rates on asbestos from the Canadian mines to the shippers in southern territory and unduly preferential rates on the same commodities from the same origin points to their competitors in official territory.

After appropriate proceedings, the Commission issued its report of May 7, 1958 (App. C, *infra*, pp. 17a–39a) in which it found the rates to be both unduly preferential and prejudicial, in violation of Section 3(1), and unjust and unreasonable. It ordered the carriers to establish rates for shipments to the complainants' plants in southern territory which would not exceed the rates to points in official territory by more than specified amounts, and found the complainants entitled to reparations. On March 11, in denying petitions for reconsideration, it clarified its prior

[5] The first complaint was filed with the Commission on June 22, 1951, and similarly affected shippers filed complaints on December 6 and 13, 1954. In all, the consolidated proceeding before the Commission involved five separate complaints by adversely affected southern shippers.

order so as to make clear that the carriers were left with alternatives in removing the discriminations violative of Section 3(1) (App. E., *infra*, pp. 43a–44a).

On March 12, 1959, the rail carriers instituted an action in the District Court seeking to set aside the report and order of the Commission entered May 7, 1958.[9] Thereafter, on March 7, 1960, the District Court rendered its opinion and order, setting aside and annulling the orders of the Commission and remanded the cause to the Commission for further proceedings in conformity with its opinion. (Appendix C, *infra*, p. 17a). On March 26, 1960, the District Court denied the defendants' Motion for Reconsideration and to Alter or Amend the Judgment.

THE QUESTIONS ARE SUBSTANTIAL

1. The Commission's report of May 7, 1958, found the rates involved to be unlawful on two grounds: (1) that they were unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act; and (2) that they were unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory, in violation of Section 3(1) of the Act. However, the dis-

[9] On April 6, 1959, a group of southern rail carriers was permitted by the District Court to withdraw as parties plaintiff from the suit. These were the Alabama Great Southern Railroad Company; Atlantic Coast Line Railroad Company; Cincinnati, New Orleans & Texas Pacific Railway Company; New Orleans and Northeastern Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railroad Company; and the Southern Railway Company.

trict court restricted its consideration and decision of the case as follows:

> A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States.

The district court resolved this question adversely to the Commission. While this question may be relevant in determining the validity of the Commission's finding that the rates are unjust and unreasonable, it has no relevance to the Commission's separate finding that the rates created undue prejudice and preference. However, the district court apparently viewed the single question as stated by it as dispositive of both phases of the case, for its opinion contains no discussion of the Section 3(1) issue and it denied a motion for reconsideration which pointed out its failure to treat with the separate issue of undue prejudice and preference under that section.

"The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." *New York* v. *United States*, 331 U.S. 284, 296. Here, the Commission found that the appellee railroads "admit * * * that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation" (App. C, *infra*, p. 30a) Discriminations violative of Section 3(1) are created by carriers maintaining joint rates from a common origin point to some destinations while refusing to establish such rates to

other destinations. The failure of the appellee railroads to establish joint rates upon the same basis to destinations in southern territory resulted in undue prejudice and preference prohibited by Section 3(1). Even if the compared rates, tested separately, are reasonable and lawful in all other respects, the fact of discrimination creates a violation of Section 3(1) which the Commission may correct. *New York* v. *United States,* 331 U.S. 284, 341–345. Even if, contrary to our contention (*infra,* at pp. 10–13), the Commission is without power to determine whether the combination rates from the Canadian origins to destinations in southern territory are just and reasonable, that circumstance does not affect the Commission's power to direct the appellee railroads, insofar as they perform transportation within the United States, to discontinue the discrimination. Similarly, while the Commission may be without power to require the railroads operating in the United States to enter into joint rates with railroads operating in Canada, such circumstance does not affect the Commission's power to eliminate discrimination. Here, the Commission has not required the establishment of such joint rates. Rather, the Commission, gave to the carriers operating in the United States (and whose participation in joint rates to official territory, while not participating in joint rates on a comparable basis to southern territory, produced discrimination) the choice of eliminating the discrimination by raising the rates to official territory or lowering them to southern territories. Such a choice is required under

Section 3(1) (*Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 650), and was expressly given to the carriers by the Commission's Supplemental Order of March 11, 1959 (App. E, *infra*, p. 43a).

Section 3(1) clearly was intended to protect shippers and localities in this country from undue preference and prejudice with respect to the movement of goods to and from foreign countries. It cannot be that American carriers remain free to create such discrimination by voluntarily joining with foreign carriers to establish rates which discriminate between shippers and localities. Since this discriminatory pattern is potentially applicable to a large volume and variety of traffic, the question is one of substantial importance which should be determined by this Court.

2. An entirely separate question is whether the district court erred in holding that the Commission was without jurisdiction to determine whether the combination rates from Canadian origins to destinations in southern territory were just and reasonable.

The court below defined the issue before it as simply whether the Commission has jurisdiction "over the foreign factor of a combination international rate when the foreign factor is a proportional rate from points of origin to a border interchange point within the United States". (App. A, *infra*, p. 2a.) This question misconceives the issues which confronted the Commission.

The Commission had before it the complaints of shippers which placed in issue the lawfulness of the entire combination through rate filed with the Com-

mission by the rail carriers, applicable from Canadian origins to destinations in the south. The southern shippers challenged the lawfulness of the *total* charge since they were not concerned with the separate factors which made up the total charge, *Great Northern Ry.* v. *Sullivan,* 294 U.S. 458, 463, and because the rail carriers, derelict in their duty, failed to publish just and reasonable rates pursuant to sections 1(5), 6(1) and (7) of the Interstate Commerce Act, 49 U.S.C. sections 1(5), 6(1) and (7), applicable from the international boundary line to the southern destinations. *News Syndicate Co.* v. *N.Y.C. R.R.,* 275 U.S. 179; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U.S. 654.

When the Commission found the combination through rates unlawful, it specifically held that it had no extraterritorial power for it said, "Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States." It emphatically stated that "We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants." (App. C, *infra,* p. 32a). Although it was necessary for the Commission to take into consideration the Canadian factor of the through rate, nevertheless it specifically restricted its ultimate findings and order to "the transportation [which] took or takes place within the United States." *Great Northern R. Co.* v. *Sullivan,* 294 U.S. 458. (App. C, *infra,* p. 37a.) Contrary to the lower court's opinion, the Commission did

not take jurisdiction over transportation beyond the territorial limits of the United States, and to this extent, we submit, the lower court is in error.

The district court conceded that under precedents of this Court, *News Syndicate Co., supra, Lewis-Simas-Jones, supra,* there would be no question of the Commission's jurisdiction over the assailed rates had they been published as joint rates. (App. A, *infra,* p. 6a.) Consequently, since the rate factors which constituted the combination through rates are published separately, the district court held that the Commission had no jurisdiction to determine the lawfulness of the challenged rates. However, the Commission did not rest its jurisdiction upon the mere form of the rate publication. It acted under the authority vested in it by sections 1(1)(a) and (2) of the Act, 49 U.S.C. 1(1)(a) and (2), which state in part, "That the provisions of this part shall apply to common carriers engaged in the transportation of passengers or property wholly by railroad * * * from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States." Pursuant to this clear and unequivocal mandate, the Commission in its opinion held that, "We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication." (App. C, *infra,* p. 35a.)

The Commission expressly found that the points of interchange, "Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international

boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States." (App. C, *infra,* p. 32a.)

The district court concluded, to the contrary, that "the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge" (App. A, *infra,* p. 10a.) We submit that such a doctrine of *de minimis* is inconsistent with the basic jurisdictional definitions of sections 1(1)(a) and 1(2). It is also inconsistent with the district court's concession that "If * * * the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction" (App. A, *infra,* p. 14a.) In any event, since this question is of recurring importance, we submit that it should be resolved by this Court.

CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary con-

sideration, with briefs and oral argument, for their resolution.

Respectfully submitted.

ROBERT W. GINNANE,
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H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

JULY 1960.

APPENDIX A

United States District Court, District of Vermont

CIVIL ACTION No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

Argued July 9, 1959. Finally submitted on briefs, November 1, 1959. Decided March 7, 1960

Before: WATERMAN, *Circuit Judge*, FOLEY and GIBSON, *District Judges*

Horace H. Powers, St. Albans, Vermont; (J. Raymond Hoover, Washington, D.C.; J. Edgar McDonald, New York City; William H. Parsons, Washington, D.C.; John F. Reilly, New York City, of counsel) for Plaintiffs.

Robert W. Ginnane, General Counsel; H. Neil Garson, Assoc. General Counsel, for Interstate Commerce Commission.

Robert A. Bicks, Acting Asst. Atty. General; John H. D. Wigger, Attorney, Department of Justice, Washington, D.C.; Louis G. Whitcomb, U.S. Attor-

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ney for Vermont, Rutland, Vermont, for United States of America.

John D. Carbine, Rutland, Vermont; E. B. Ussery, Columbia, South Carolina (Harvey L. Golden, Joseph J. Lipton, Columbia, South Carolina, of counsel) for Interveners.

WATERMAN, *Circuit Judge*:

Ninety-one railroads[1] join in this action to enjoin and annul certain orders of the Interstate Commerce Commission,[2] entered pursuant to a decision of the full Commission reported at 303 ICC 743 (May 7, 1958). A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?

The rates in question pertain to the carriers of asbestos, a transportation originating in the Province of Quebec, Canada, and terminating at various points in North and South Carolina. The principal source of asbestos for United States manufacturers of asbestos products is a narrow belt of land in southern Quebec extending northeast and southwest approximately fifty miles west of the Maine border. Railroad appears to be the principal method of transporting this asbestos to its American users. The

[1] Originally ninety-eight railroads joined as plaintiffs. However, on April 6, 1959, Judge Gibson issued an order permitting seven southern railroads to withdraw.

[2] Two orders are attacked. They are an Order dated May 7, 1958, that required the railroads to cease and desist from exacting rates held to be unreasonable and prejudicial in the Commission's decision of the same date; and an Order dated February 19, 1959, that amended the effective date of the May 7, 1958 order.

asbestos area of southern Quebec is served by two Canadian railroads, the Canadian National and the Quebec Central. Asbestos intended for consignees in the southern-Atlantic states is carried by the Canadian lines to East Alburg, Vermont, and Newport, Vermont (points respectively 3 and 5 miles south of the international boundary) where the cars are turned over to American railroads in an "interchange" operation. Customs inspection on incoming railroad freight occurs at East Alburg and at Newport; and, to that extent at least, these towns may be regarded as border points.

The Canadian carriers have joined with American carriers in the publication of joint rates for the carriage of asbestos to points in the middle-Atlantic states and the middle-west. However, for the carriage of asbestos to the southern-Atlantic states the carriers concerned have not published joint rates but instead have published combination rates.[3] One factor of these combination rates is a proportional rate[4] pertaining to the transportation from the mines in Quebec to the Vermont points of interchange. The other factor is a local rate pertaining to the transportation from these points of interchange to the various southern destinations.

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[3] In railroad parlance a *joint* rate on a through route differs from a *combination* rate on a through route in that a joint rate is reached through an agreement of the participating carriers and each participating carrier is jointly and severally liable for the entire rate. See *Louisville and N.R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217 (1925) at pp. 231–234.

[4] A *proportional* rate covers a portion of a through route and differs from a *local* rate between the same points in that the proportional rate applies only to transportation on the through route. See *Lewis-Simas-Jones Co.* v. *Southern Pacific R. Co.*, 283 U.S. 654, 663 (1931). Apparently the rates south of East Alburg and Newport to the Carolinas are merely local rates.

In 1951 Thermoid Company, Southern Division, a manufacturer of asbestos textile products, located in Charlotte, North Carolina, filed with the Commission a complaint alleging that the combination rates for the carriage of asbestos from mines located along the lines of the Quebec Central to Charlotte were unreasonable and were prejudicial in comparison with the joint rates given complainant's competitors in the middle-Atlantic states and the middle-west. As the complaint wound its way upward through the various levels of Commission adjudication, four additional complaints of a similar nature were consolidated with it.[5] In its decision the Commission accepted complainant's contentions. It held that the Quebec-Carolina rates were unreasonable and prejudicial and ordered reparation to the extent that the rates exceeded the rates for comparable distances charged complainants' competitors in the middle-Atlantic states and the middle-west.

We are, of course, without authority to consider the validity of the Commission's orders allowing reparations;[6] and plaintiffs here do not argue that the

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[5] The net effect of the consolidation was to increase the number of complainants to four so that the group then included manufacturers of asbestos products in Charlotte, Davidson and Marshville, North Carolina, and North Charleston, South Carolina and to expand the complaint so as to bring into question the rates from the mines along the Canadian National as well as those from the mines along the Quebec Central.

The four complainants in the proceedings before the Commission have intervened in this action under 28 U.S.C. § 2323.

[6] Under 28 U.S.C. § 2321 the jurisdiction of a three-judge district court extends to all orders of the Commission save those "* * * for the payment of money or the collection of fines, penalties and forfeitures * * *" Under 49 U.S.C. § 16(a) an action for the enforcement of a reparations order is to be brought by the complainant in one of several district courts

Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if those rates are to be viewed as an indivisible entity. Plaintiffs' argument before this court is confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas.

The Commission's power with respect to transportation wholly by railroad is set forth in Sections 1(1)(a) and 1(2) of the Interstate Commerce Act, 49 U.S.C. §§ 1(1)(a), and 1(2). These sections in pertinent part read as follows:

> Carriers subject to regulation
>
> (1) The provisions of this chapter shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad, * * *.
>
> * * * * * * *
>
> * * * from or to any place in the United States to or from a foreign country, *but only insofar as such transportation* or transmission *takes place within the United States.*
>
> Transportation subject to regulation
>
> (2) The provisions of this chapter shall also apply to such transportation of passengers and property * * * *but only insofar as such transportation* or transmission *takes place within the United States* * * *. [Italics supplied.]

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or in a state court. In *United States* v. *ICC*, 337 U.S. 426 (1949) the Supreme Court indicated that the activities of a three-judge district court were to be carefully confined to those expressly provided for by Congress.

As the Commission emphasized in its decision in the present case, it is now firmly established that American rail carriers have a clear alternative with respect to the manner of publishing rates applicable to international transportation. They may choose to publish rates applicable only to that portion of the transportation which they themselves perform; or they may join with the foreign carrier and publish a joint rate for the entire transportation, thereby assuming joint and several liability for any unlawfulness in the rate agreed upon. Thus it is well settled that the Commission does not have power to require carriers to enter into joint rates for international transportation. See *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654, 660 (1931); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520, 523 (1932); *International Nickel Co.* v. *Director General*, 66 ICC 627 (1922). However, it is equally well settled that the Commission does have power to pass upon the legality of existing joint rates on international transportation, and, in connection with this power, in a proper case, it may order the American carriers to cease participation in these rates, and to pay reparations. This was the Commission's interpretation prior to the 1920 amendments to Sections 1(1) and 1(2), which for the first time expressly limited the Commission's jurisdiction to transportation "only insofar as such transportation * * * takes place within the United States."[7]

[7] Prior to February 28, 1920, Section 1(1) declared the Act to be applicable to carriers engaged in any of four types of international transportation: (1) from the United States to an adjacent foreign country; (2) from the United States through a foreign country to the United States; (3) from the United States to a foreign country when shipment is being carried from an originating point in the United States to a

See *Black Horse Tobacco Co.* v. *Illinois Central R. Co.*, 17 ICC 588, 590 (1910). The Commission quickly held that the 1920 amendments did not affect this power that had been exercised over existing joint international rates, *International Nickel Co.* v. *Director General*, 66 ICC 627 (1922). The Supreme Court has upheld the Commission's interpretation in two cases, *News Syndicate Co.* v. *New York Cent. R. Co.*, 275 U.S. 178 (1927) and *Lewis-Simas-Jones Co.* v. *Southern Pac. R. Co.*, 283 U.S. 654 (1931).[8]

port of transshipment; (4) from a foreign country to the United States when the shipment is being carried to a terminating point in the United States from a port of entry either in the United States or in an adjacent foreign country. In *Galveston, H. & S. A. R. Co.* v. *Woodbury*, 254 U.S. 357 (1920), a case decided under Section 1(1) as it existed prior to the 1920 Amendments, the Supreme Court held that transportation *from* an adjacent foreign country to the United States was within the Commission's jurisdiction under the provisions relating to the transportation from the United States to an adjacent foreign country. On February 28, 1920 (Section 400 of the Transportation Act of 1920, 41 Stat. 474) Section 1(1) was amended to apply to transportation: (1) from the United States through a foreign country to the United States, and (2) from or to the United States to or from a foreign country; but only insofar as these two types of international transportation take place within the United States. Section 1(2) quoted in the opinion, was a new section added by the 1920 Act.

[8] There is language in *News Syndicate*, *supra*, at 186–87, and *Lewis-Simas-Jones*, *supra*, at 663, which might be construed as indicating that the Commission would be without jurisdiction over the joint rate if the American carrier had also published a rate for the American portion of the transportation. The Commission, however, has subsequently held that it has jurisdiction over joint rates irrespective of whatever additional rates may be filed. *Carstens Packing Co.* v. *Great Northern R. Co.*, 264 ICC 164 (1945); see also *Cyanamid and Cyanide from Niagara Falls, Ont.*, 155 ICC 488 (1929); *Publication of Rates between United States and Canada*, 147 ICC 778 (1928).

The rates the Commission found unreasonable and prejudicial in the present case, however, were not joint rates, but were combination rates. The Canadian carriers published proportional rates to East Alburg, Vermont, and Newport, Vermont, the interchange points; and the American carriers published local rates for the remainder of the transportation. The Commission does not dispute plaintiffs' statement that there are no facilities for interchange available between the international boundary and East Alburg and Newport. Nor does the Commission dispute that, as to shipments under the assailed combination rates, the Canadian carriers operate within the United States only for the purpose of turning over the asbestos to American carriers.[9] In its decision the Commission made no findings that the local rates south of the interchange points were unreasonable or prejudicial. The Commission, nevertheless, held that it had power to review the entire transportation charge—from mines in Quebec to consignees in the Carolinas—because the interchange occurred within the United States.[10] The Commission stated its position in the following words:

> The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all

[9] Because the Canadian rate is a proportional rate, it does not apply to any shipments to American consignees at points between the international boundary line and the interchange points, nor does it apply to shipments to be delivered by Canadian carriers to consignees located at the interchange points.

[10] As to those shipments where the interchange occurred at St. Johns, Quebec, the Commission held that the Canadian carrier was not liable for reparation. Apparently, however, the American carriers were liable for reparation even as to these shipments.

practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. [The Commission's reference is to publication of rates to and from the international boundary.] The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to those points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States.

First, it should be observed that although the Commission stated that it was regulating transportation which took place within the United States, it made no effort, when it handed down its finding as to the unreasonableness of the assailed transportation charge, to distinguish between that portion of the charge covering the transportation which took place in the United States and that portion covering the transportation within Canada.[11] It is now settled that the Commission need not make this distinction if the international transportation is conducted on the basis of a joint rate because the American carriers have elected to become jointly and severally liable for the entire

[11] In its decision in the present case the Commission states, at p. 754, that its jurisdiction here exists "regardless of the manner of rate publication." We gather this to mean that the Commission would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional, and meaningless, proportional rate from the border to the border points of interchange.

transportation charge, and because a contrary rule would force the Commission to rely upon the unpublished and possibly unverifiable divisions of the joint rate between the American carrier and the foreign carrier. This is not the situation where the American carrier and the foreign carrier each publish rates to and from a border point where interchange occurs. In this latter situation, unless the rate of the foreign carrier is left to regulation by the foreign country the phrase "but only insofar as such transportation takes place within the United States" will be drained of all meaning. Surely the fact that interchange occurs a few miles on one side of the boundary as opposed to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. It is our belief that the Commission would give short shrift to an argument that it had no jurisdiction over the American factor if the interchange occurred at a border point a few miles within the foreign country.[12]

Second, if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Third, the Commission would appear to have been in error when, in its decision in the instant case, it stated that its prior holdings support its present position. The Commission relied upon *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 ICC 139 (1934); *Newsprint Paper to Detroit*, 161 ICC 63 (1930);

[12] See note 10, *supra*.

Simpson Co. v. *Grand Trunk W. R. Co.*, 129 ICC 430 (1927); *Larrowe Milling Co.* v. *Chatham W. & L. E. R. Co.*, 52 ICC 145 (1919); *Iron and Steel Wire, Buffalo, N.Y. to Kitchener, Ont.*, 294 ICC 515 (1955); and to a lesser extent upon *Control of Hereford Ry. Co.*, 99 ICC 7 (1925) and *Status of Napierville Junction R. Co.*, 266 ICC 471 (1946). In *Fruit Importers, Newsprint to Detroit, Simpson Co.*, and *Wire, Buffalo to Kitchener*, the assailed rates were joint rates over which the Commission's jurisdiction is conceded. In *Larrowe Milling* the shipper assailed carload minima concurred in by both the Canadian and American carriers, thus presenting a situation analogous to a joint rate. In *Control of Hereford Ry. Co.*, a case involving the application of an American carrier to acquire control of a line 52.85 miles in length of which all but 0.67 miles were in Canada, and to abandon operations along this line, the Commission held it had authority to approve the acquisition under Section 5 (a) but that its abandonment jurisdiction extended only to the trackage within the United States. In *Napierville Junction* the Commission held that a Canadian line whose trackage ended at the international boundary was not subject to the provisions of the Act even though its crews and equipment did conduct some operations on the one mile of track in the United States between the border and Rouses Point, N.Y. These last two cases hardly support the expanded interpretation of its jurisdiction which the Commission has advanced in the present case.

Not only do the cited decisions fail to support the Commission's present position, but, furthermore, whenever the problem has previously been faced the Commission has indicated that it lacked jurisdiction to review the foreign factor of a combination inter-

national rate."[13] In *Albee Fruit Co.* v. *Atlantic Coast Line R. Co.*, 293 ICC 785, Montreal consignees of fresh fruit from the Florida area filed complaints as to the combination rates made over Rouses Point, N.Y. In limiting its jurisdiction the Commission stated: "The rates here assailed are combination rates based on border points, and the only factors in such combinations over which we have jurisdiction are those applying to such border points." *Hoffman-Taff, Inc.* v. *St. Louis S. F. R. Co.*, 279 ICC 710, 712 (1950) involved rates on shipments of aqua ammoniac from originating points in Canada to Springfield, Missouri. The rates were combination rates made over Detroit and Port Huron, and apparently the complaint attacked only the Canadian portion of the

[13] *Watab Paper Co.* v. *Canadian National R. Co.*, 152 ICC 265 (1929) appears to be the single exception to the above statment. Watab involved shipments of pulpwood from Manitoba points of origin approximately thirty miles north of the border to a consignee in central Minnesota. After reaching the interchange point of Warroad, Minnesota, approximately six miles south of the border, the shipments were misrouted so as not to travel along the least expensive routing. In computing damages the Commission held that the factor from the Manitoba points of origin to Warroad was unreasonable. Jurisdiction to make such a holding was premised upon a Section 4 violation, resulting from the fact that the rates from the Manitoba points of origin to Warroad were greater than the rate from the points of origin to International Falls, Minnesota, a point approximately seventy-five miles east of Warroad and a point which shipments from the points of origin could reach only by routing through Warroad. However, the Commission recognized that these circumstances were most unusual, stating at p. 268: "Where the rate from a point in Canada to a destination in the United States is *based on a combination of the rates to and from a border point within the United States, our jurisdiction ordinarily extends only to the rate within the United States.*" [Italic supplied.]

rates. The Commission stated: "On the instant traffic, the United States carriers concerned elected not to join in the publication of single-factor through rates, and the combinations on Detroit and Port Huron, which for all practical purposes are international border points, applied. Only the Canadian rates, as factors of the through combinations are assailed. The defendants operating within this country are not answerable for those rates, but only for the rate from the border points to destination and which is not here assailed. It follows that the complaint assails rates over which this Commission has no jurisdiction." In *E. J. Stanton* v. *Atchison, T. & S. F. R. Co.*, 258 ICC 315 (1944) the Commission, after holding the American factors to be reasonable, refused to pass upon the Canadian factors of combination rates on the shipment of lumber from Los Angeles to the Maritime Provinces made over Port Huron, Detroit, Buffalo, and Rouses Point. For cases of similar import see *Dow Chemical Co.* v. *Alton & S. R. Co.*, 284 ICC 365 (1952); *Crelinsten* v. *Railway Express*, 201 ICC 284 (1934); *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 188 ICC 520 (1932). In summary, then, the Commission has consistently interpreted its statute in a manner contrary to its interpretation in the present case. This consistent interpretation ought not to be set aside, either by the courts or by the Commission, without a strong showing to justify departure. *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 395–97 (1956); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 351–52 (1941).

It is contended that support for the Commission's present interpretation may be found in *Great Northern R. Co.* v. *Sullivan*, 294 U.S. 458 (1935). The *Sullivan* case involved the complaint of a North Dakota consignee of lignite mined in Alberta, Canada.

The shipment moved on a combination rate made over an international-border point located within the United States. The Commission awarded reparations upon a finding that the American factor was unreasonable. The Supreme Court reversed, holding that an award of reparations was improper without a finding that the entire rate, i.e., the sum of the American and Canadian factors, was excessive. Thus it is argued that *Sullivan* equated combination international rates with joint international rates for purposes of the Commission's jurisdiction. We believe that a closer reading of the *Sullivan* case will reveal that the Court there was not dealing with the Commission's jurisdiction, but rather with the consignee's proof of injury. As we read the case the Court held that a complainant seeking reparations by attacking the American factor of a combination international rate must not only demonstrate the unreasonableness of the factor over which the Commission has jurisdiction but also the unreasonableness of the sum of the combined rates.

Finally, the Commission argues that unless we accept its present interpretation there will be left an unregulated "no-man's land" between the international boundary and the interchange points. This argument is unpersuasive. The issue here is whether the Commission has jurisdiction over certain rates, not whether the Commission has jurisdiction over the Canadian carriers. If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. See *Control of Hereford Ry. Co.*, 99 ICC 7 (1925); *Lease of Line by Canadian Pac. R. Co.*, 105 ICC 575 (1926). We merely hold that the carriage of freight by rail on a proportional rate from a point

of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate.

The orders described in note 2, *supra,* are annulled and set aside, and the cause is remanded for further proceedings in conformity with this opinion.

STERRY R. WATERMAN
U.S. Circuit Judge.

I concur:

JAMES T. FOLEY
U.S. District Judge.

I concur:

ERNEST W. GIBSON
U.S. District Judge.

APPENDIX B

United States District Court, District of Vermont

Civil Action No. 2713

CENTRAL VERMONT RAILWAY, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

ORDER

The motions for reconsideration filed March 17, 1960 (1) on behalf of the United States of America and the Interstate Commerce Commission, defendants, and (2) on behalf of intervening defendants, are severally denied.

STERRY R. WATERMAN,
U.S. Circuit Judge.

JAMES T. FOLEY,
U.S. District Judge.

ERNEST W. GIBSON,
U.S. District Judge.

Endorsed: Filed March 26, 1960.

ARNOLD A. MURRAY,
Clerk.

APPENDIX C

Interstate Commerce Commission

No. 30846[1]

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL

DECIDED MAY 7, 1958

1. Rates on crude asbestos and asbestos fiber from Danville, St. Malachie, Warwick, Black Lake, Coleraine, Robertson, Thetford Mines, and East Broughton, Quebec, Canada, to Charlotte, Davidson, and Marshville N.C., and North Charleston, S.C., and on asbestos waste, refuse, and shorts from the same origins to Davidson, found to have been and to be unjust and unreasonable, and for the future found to be unduly prejudicial. Reparation awarded, and defendants required to remove the unlawfulness found to exist.

2. Commission found without jurisdiction to prescribe just and reasonable joint through international rates for the future. Prior findings, 288 I.C.C. 793, modified.

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[1] This report embraces also No. 31683, *Raybestos-Manhattan, Inc., General Asbestos & Rubber Division* v. *Baltimore & Ohio Railroad Company et al.*; No. 31684, *Thermoid Company, Southern Division* v. *Same*; No. 31685, *Union Asbestos & Rubber Company* v. *Same*; and No. 31686, *Carolina Asbestos Company* v. *Same*.

Appearances as shown in prior report, and:

E. B. Ussery, Harvey L. Golden, and H. V. Fleming for complainants.

J. Edgar McDonald, R. C. Gill, Donal L. Turkal, James L. Tapley, and J. Raymond Hoover for defendants.

REPORT OF THE COMMISSION

By the Commission:

Exceptions were filed by the defendants to the report proposed by the examiner, the complainants replied, and the issues were orally argued before us. Our conclusions differ in part from those recommended by the examiner. Exceptions and requested findings not discussed herein nor reflected in our findings on conclusions have been considered and found not justified.

In the title proceeding, the complainant, a corporation engaged at Charlotte, N.C., in the manufacture, sale, and distribution of asbestos textile products, alleges by complaint filed on July 22, 1951, that the rates charged for the transportation of numerous carload shipments of crude asbestos and asbestos fiber from Black Lake, Coleraine, and Thetford Mines, Quebec, Canada, to Charlotte were and are unjust, unreasonable, and unduly prejudicial. We are asked to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

In the prior report in that proceeding, 288 I.C.C. 793, division 3 found that the assailed rates had not been shown to have been of to be unjust or unreasonable, but that they are and for the future will be unduly prejudicial to the extent that they exceed or may exceed the joint rates that are or hereafter may

[2] On further hearing in No. 30846.

be concurrently maintained on like traffic from the same origins to Chicago and Waukegan, Ill., and Milwaukee, Wis. Reparation sought was denied, and an order was entered requiring removal of the undue prejudice found to exist. Upon petition of the defendants, that order was stayed and the proceeding reopened for oral argument and reconsideration. Thereafter upon petition of the complainant, the proceeding was reopened for further hearing, which was held with the embraced proceedings on a consolidated record.

In No. 31684, the same complainant, by complaint filed on December 6, 1954, alleges that the carload rates on the same articles from Danville, St. Malachie, and Warwick, Quebec, Canada, to Charlotte are unjust, unreasonable, and unduly prejudicial, and that the rates maintained on the same articles from the same origins to destinations in official territory and in western territory adjacent thereto, are unduly preferential of complainant's competitors located in those territories. We are asked to prescribe lawful rates for the future.

In No. 31683, by complaint filed on December 6, 1954, and in Nos. 31685 and 31686, by complaints filed on December 13, 1954, the complainant corporations, which likewise are engaged in the manufacture, sale, and distribution of asbestos textile products, at North Charleston, S.C., and Marshville and Davidson, N.C., respectively, allege that the carload rates on crude asbestos and asbestos fiber from Black Lake, Colemaine, Thetford Mines, Danville, St. Malachie, Warwick, East Broughton, Robertson, and St. Joseph, Quebec, Canada to North Charleston, Marshville, and Davidson were and are unjust, unreasonable, and unduly prejudicial to the complainants, and that the rates maintained on the same articles from the same origins

to destinations in official territory, and in western territory adjacent thereto, are unduly preferential of the complainants' competitors located in those territories. In addition, the complainant in No. 31686 is engaged also in the manufacture of asbestos-cement shingles at Davidson, and alleges that the carload rates on asbestos refuse, asbestos shorts, and asbestos waste from the same origins to Davidson and destinations in official and western territories were and are unlawful in like respects. These complainants ask us to prescribe lawful rates for the future and to award reparation on shipments made during the statutory period and *pendente lite*.

The most important variety of asbestos commercially, of which there are several, is chrysotile, which constitutes about 95 percent of world production. Domestic production of asbestos is negligible, and American manufacturers are dependent upon foreign supplies. The most important commercial production of asbestos of the chrysotile variety is in an area in the Province of Quebec about 70 miles long and 5 or 6 miles wide between Danville and East Broughton, and embraces most of the origin points here concerned. Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton are on the line of the Quebec Central Railway Company extending northeastward from Sherbrooke to Valley Junction, Quebec, Canada, and St. Joseph is on the line of the same carrier extending eastward from Valley Junction. Warwick and Danville are on the line of the Canadian National Railway Company extending northeastward from Richmond, Quebec, and St. Malachie is on the lines of the same carrier extending eastward from Diamond, Quebec, Canada. There is no record of any movement from St. Joseph, and that point will not be further considered.

On the basis of use, asbestos falls into two principal classes; namely, spinning and nonspinning fiber. Spinning asbestos is used for weaving into textiles, and under the general classification of textile uses are included prepared yarns, tape, rope, cord, wick, and thread. These various products are used in the manufacture of fireproof cloth, and friction, packing, and insulating materials, where incombustibility and thermal stability are important factors. All of the complainants manufacture such products. Nonspinning fibers consist of the shorter grades of asbestos, and are used in the manufacture of asbestos-cement shingles by the complainant in No. 31686.

The rates[3] here in issue generally apply separately on crude asbestos, asbestos fiber generally, asbestos waste, and asbestos refuse and shorts. The origins of Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton on the Quebec Central, and Danville and Warwick on the Canadian National, are grouped for ratemaking purposes, and Thetford Mines and Danville will hereinafter be used as illustrative. From both Danville and Thetford Mines to destinations in official territory, and points in western territory adjacent thereto, the defendants maintain joint through international commodity rates. The rates from Danville are substantially lower than those from Thetford Mines, although the distances do not vary greatly. To southern destinations, however, no joint through rates are maintained, and the complainants are required to pay charges based on combination rates. The Canadian lines maintain proportional rates to various ports of entry in the United States, except on asbestos waste from Danville, restricted to apply

[3] Rates are stated in amounts per 100 pounds, and do not include the increases authorized in Ex Parte No. 175 and subsequently.

only on traffic destined to points in the United States. On asbestos waste from Danville, the lowest combination results from the use of a joint through rate applicable to Baltimore, Md., as a factor. Southbound from the ports of entry and from Baltimore to the considered destinations, class rates apply on crude asbestos to all destinations, on asbestos fiber to North Charleston, and on asbestos refuse, shorts, and waste to Davidson, and commodity rates apply on asbestos fiber to Charlotte, Davidson, and Marshville.

So far as is here pertinent, the proportional rates mentioned above are published to apply from Danville to East Alburgh, Vt., and those from Thetford Mines to Newport, Vt. East Alburgh and Newport are both customs ports of entry. The line of the Canadian National extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Inc. The line of the Quebec Central likewise extends across the international boundary about 5 miles to Newport,[4] where it connects with the Canadian Pacific. These are the only rail carriers serving Newport. Although tariff authority is obscure, the record indicates that the East Alburgh rate also applies from Danville on shipments routed to Marshville through Rouses Point, N.Y., another customs port of entry located about 0.5 mile from the international boundary, at which the shipments are interchanged by the Canadian National with The Delaware and Hudson Railroad Corporation. Until about November 1955, shipments routed from Danville through East Alburgh, and charged at that

[4] By virtue of trackage rights over the line of the Canadian Pacific Railway Company from the international boundary to Newport. The Quebec Central is a subsidiary of the Canadian Pacific Railway Company. See *Canadian Pacific Ry. Co. Lease*, 105 I.C.C. 575, 576.

rate, were interchanged by the Canadian National with the Central Vermont at St. Johns, Quebec, Canada, for operating convenience, and on such shipments no transportation within the United States was performed by the Canadian National. The proportional rates from Danville to East Alburgh are restricted so as not to apply at intermediate destinations in Canada.

The proportional rates from Danville on the Canadian National and Thetford Mines on the Quebec Central to East Alburgh and Newport, respectively, are 33 cents, minimum 40,000 pounds, on crude asbestos, 28 cents, minimum 40,000 pounds, and 25 cents, minimum 80,000 pounds, on asbestos fiber, and 14 cents, minimum 60,000 pounds, and 13 cents minimum 80,000 pounds, on asbestos refuse and shorts. On asbestos waste from Thetford Mines to Newport, the proportional rates are 20 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds. On asbestos waste from Danville to Baltimore, the joint through rates are 53 cents, minimum 60,000 pounds, and 48 cents, minimum 80,000 pounds. In the uniform classification, crude asbestos is rated class 35,[5] minimum 50,000 pounds, asbestos fiber is rated class 35, minimum 30,000 pounds, asbestos shorts and waste are rated class 27.5, minimum 40,000 pounds, and asbestos refuse takes the same rating as asbestos shorts by the rule of analogy.

The class 35 rates applicable from East Alburgh to Charlotte, Davidson, Marshville, and North Charleston are $1.17, $1.16, $1.19, and $1.26, respectively. From Newport to the same respective destinations, the class 35 rates are $1.21, $1.19, $1.23, and $1.30. From East Alburgh and Newport to Davidson, the

[5] Class numbers represent percentages of the docket No. 28300 first-class rates.

class 27.5 rates are 91 cents and 94 cents, respectively, and the corresponding class rate from Baltimore to Davidson is 58 cents. From both East Alburgh and Newport commodity rates of $1.06 to Charlotte and Davidson, and $1.08 to Marshville, apply on asbestos fiber. These rates are somewhat lower than the class 35 rates mentioned above, and had their inception in the publication in 1936 of the then applicable class A or eighth-class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-rate routing. Because of lesser increases imposed on commodity rates than on class rates, and the adjustment of class-rate scales under our order in docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates to Charlotte, Davidson, and Marshville over all routes. Davidson is intermediate to Charlotte from East Alburgh and Newport, and the rate to Marshville is made 2 cents more than the rate to Charlotte under the provisions of fourth-section order No. 9800. The combination of these class and commodity rates with the proportional rates applicable from the Canadian mines to the ports of entry make up the through rates borne by the complainants. Freight charges are generally prepaid at origin, are billed separately to the complainants by the consignors, and are borne in full by the former.

The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there. Among other points, asbestos textile products are manufactured by concerns with plants at Ambler, Pa., Manville, N.J., North Brookfield, Mass., Chicago, Ill., Meredith N.H., and Kirkwood (St. Louis), Mo. Asbestos-cement shingles are manufactured at Manville, Ambler, St. Louis, Cin-

cinnati, Ohio, Rutherford, N.J., and Chicago Heights (Chicago), Ill. Sales competition in all of these commodities is extremely keen, and on the textile products price differences of 0.1 to 0.25 cents per pound will gain or lose sales. Manufacturers of asbestos products in official territory have for many years had available joint through international commodity rates from the Canadian mines for application on their shipments. These rates stem from an adjustment established early in the century under which rates from Danville on the Canadian National and from Sherbrooke on the Quebec Central were the same to all destinations, and the rates from Thetford Mines made 14 cents, and later 10 cents, over the Sherbrooke rates. In September 1954, after a few rates on asbestos fiber had been established with an 80,000-pound minimum to a limited number of points, similar rates were published to numerous destinations. Except for the proportional rates applicable from the Canadian mines to Newport and East Alburgh, the complainants do not have the advantage of such rates, although on asbestos fiber in numerous instances and on asbestos waste, shorts, and refuse in practically all instances their shipments equal or exceed 80,000 pounds.

The table in the appendix hereto compares representative applicable joint through rates on crude asbestos and asbestos fiber available to the complainants' competitors with the combination rates applicable to Charlotte, Davidson, Marshville, and North Charleston. It will be noted that to points in official territory the rates from Danville on the Canadian National are in all instances lower than the rates from Thetford Mines on the Quebec Central. Asbestos producers on the Quebec Central, on shipments to points in official territory, absorb these rate differences, so that for all practical purposes receivers in that terri-

tory receive the benefit of the Canadian National rates. The complainants raise no issue concerning these rate differences as such, but ask that, if relief is afforded them, similar rate differences as between Canadian National and Quebec Central origins be observed as to rates to their destinations, so that they will likewise be eligible to receive the benefit of partial rate absorption by the Quebec Central producers.

The joint through rates maintained to points in official territory bear little relation to distance. For example, the rates on asbestos fiber from Danville to Ogdensburg, N.Y., 209 miles, and to Winchester, Va., 700 miles, are the same as the rates to Ambler and Manville, 68 cents, minimum 40,000 pounds and 61 cents, minimum 80,000 pounds, and the same rates apply to practically all points in trunkline territory from New York, N.Y., to the western border of Pennsylvania; the rates on asbestos fiber from Thetford Mines to Jackson, Mich., 719 miles, and to Mundelein, Ill., 1,024 miles, are the same as the rates to Chicago; and the rates from Danville to Peoria, Ill., 1,026 miles, and to Hanibal, Mo., 1,149 miles, are the same as the rates to St. Louis.

The rates on asbestos waste, shorts, and refuse reflect similar comparisons. On asbestos refuse and shorts from Thetford Mines, the combination rates to Davidson are $1.08, minimum 60,000 pounds, and $1.07, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 62 cents and 57 cents to Chicago, 72 cents and 66 cents to St. Louis, and 58 cents and 53 cents to Ambler and Manville. From Danville, the corresponding rates on asbestos refuse and shorts are $1.05 and $1.04 to Davidson, 51 cents and 46 cents to Ambler and Manville, 53 cents and 48 cents to Chicago, and 63 cents and 57 cents to St. Louis. On asbestos waste from

Thetford Mines, the combination rates to Davidson are $1.14, minimum 60,000 pounds, and $1.12, minimum 80,000 pounds, and the joint through rates on the same respective minimum weights are 67 cents and 62 cents to Ambler and Manville, 70 cents and 64 cents to Chicago, and 80 cents and 73 cents to St. Louis. From Danville, the corresponding rates on asbestos waste are $1.11 and $1.06 to Davidson, 53 cents and 48 cents to Ambler and Manville, 57 cents and 51 cents to Chicago, and 67 cents and 60 cents to St. Louis.

Joint through class rates are maintained from points in Quebec to points in official territory, which reflect levels approximately 10 percent higher than the docket No. 15879 class rates formerly prescribed for application within official territory. To illustrate the disparity in treatment as between the complainants and receivers of asbestos in official territory, the complainants compare the applicable joint through commodity rates based on the lowest minimum weights to official-territory points with the class rates and with combination rates constructed as are the rates to the complainants' destinations. For example, on crude asbestos from Thetford Mines to Arabler, the joint through rate is 97 cents, the class rate is $1.32, and the combination rate would be $1.12, and on asbestos fiber the commodity rate is 86 cents, the class rate $1.32, and the combination rate $1.07. On crude asbestos from Danville to Chicago, the commodity rate is $1.03, the class rate $1.30, and the combination rate $1.45, and on asbestos fiber the commodity rate is 85 cents, the class rate $1.30, and the combination rate $1.40.

Asbestos is produced at Matheson, Ontario, and Vancouver, British Columbia, Canada. The rates on crude asbestos and asbestos fiber from Matheson to

Chicago and St. Louis are the same as those from Danville, for comparable distances. From Vancouver, the rates are published on the standard transcontinental group bases, and on all grades of asbestos, crude, fiber, waste, and shorts, minimum 60,000 pounds, on December 1, 1953, were $1.54 to group A embracing Ambler and Manville, group K embracing the considered Carolina destinations, and group B embracing Pittsburgh, Pa.; $1.36 to group C embracing Michigan and Indiana points; $1.01 to group D embracing Chicago; and 93 cents to group E–4 embracing St. Louis. On April 1, 1954, to meet water competition to the Carolina destinations, the rate to group K was reduced to $1.38. This rate was likewise made applicable to group A points, and the rate to group B was reduced to $1.25, and the rate to group C to $1.13. Westbound joint through transcontinental rates are also maintained from Danville and Thetford Mines, applicable to Pacific coast groups, and the rates from these respective origins to Watson, Calif, for distances approximately 2.5 times those to the Carolina destinations, on asbestos fiber are $1.72 and $1.89, minimum 60,000 pounds, and $1.28 and $1.45, minimum 80,000 pounds; on asbestos waste, $1.13 and $1.27, minimum 80,000 pounds; and on asbestos refuse and shorts, $1.13 and $1.22, minimum 80,000 pounds.

The complainants have lost ground in recent years in their efforts to compete in the sale of asbestos textile products, particularly since the readjustment of the joint through international rates to points in official territory providing rates on a minimum weight of 80,000 pounds. The proportion of the industrywide production produced by the Thermoid Company, Southern Division, has declined from 28.33 percent in 1950 to 16.5 percent in the first 3 months

of 1955. In 1949 this complainant marketed 95.6 percent of its total asbestos textile production in official territory, and in the first 6 months of 1955 that percentage dropped to 80.2. Raybestos-Manhattan, Inc., experienced a decline in its proportion of total industry production from 28.52 percent in 1951 to 22.39 percent in the first 3 months of 1955, and the proportion of its products sold in official territory dropped from 75.55 percent in 1951 to 63.49 percent in the first 6 months of 1955. In 1952, the production of asbestos textile products by the Union Asbestos and Rubber Company represented 8.92 percent of total industry production. By 1955 this had dropped to 2.93 percent, and this complainant was finding it increasingly difficult to compete for sales in official territory, which represents the bulk of its markets. The Carolina Asbestos Company has generally maintained its position in the industry, but at the sacrifice of profits and increased sales activity at greater costs. These complainants encounter severe competition in other areas from official-territory producers, and markets lost in official territory have not been recouped elsewhere.

The Carolina Asbestos Company commenced the production of asbestos-cement shingles in 1953, in an attempt to diversify its production to offset the difficulties encountered in the marketing of asbestos textile products. Its market for these asbestos-cement shingles has been confined to North Carolina and South Carolina by reason of the competition from official-territory producers, and even there the competition is keen.

In April 1949, the southern rail lines proposed the establishment of joint rates, lower than the combination rates then in effect, from the Canadian origins to Charlotte, but the proposal was disapproved by the other lines. The defendants show that traditionally

rates from Canadian origins to points in the South are based on combinations over the ports of entry, and that only in exceptional instances are joint through rates maintained. They contend, as indicated below, that the Commission has jurisdiction in these proceedings only over the rate factors applicable southbound from East Alburgh and Newport, and compare the assailed rates with rates on the same commodities from those origins to other points in the South, with which they compare favorably. They contend, also, that the westbound rates are entirely under the control of the Canadian lines, in that to Chicago, for example, the Canadian carriers, over their lines from border points in Michigan, can effect delivery without participation of United States carriers. They admit, however, that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation. They assert also that the rate adjustments on asbestos first established early in the century to the western points were affected by water competition, but that the records substantiating this assertion are no longer available. There is no indication that water competition has any bearing on the maintenance of the present adjustment, particularly upon the establishment of the 80,000-pound basis of rates effected in 1954.

The defendants advert to the fact that crude asbestos is valued at $500 to $1,500 per ton, milled asbestos spinning fibers at $300 to $525 per ton, and other grades of asbestos fibers at substantially lower values, those utilized in the manufacture of asbestos-cement shingles being valued at $75 to $80 a ton, and assert that, in their view, the rate structure on asbestos requires revision in order to reflect these characteristics. They indicated at the hearing that revision of the

classification basis was then in contemplation and would shortly be published. Revised classification ratings were proposed in *Classification Ratings on Asbestos, All Territories,* 299 I.C.C. 375, and were there found not shown to be just and reasonable, and ordered canceled. The defendants show also, based on movement studies covering shipments made from the Quebec Central and Canadian National mines of asbestos fibers by grades, that the preponderance of the shipments to the Carolina destinations are of spinning grades, that the reverse is true in official and western territories, and that there are few, if any, shipments of spinning fibers from these origins to points wes of Akron, Ohio. Based on the latter circumstances, it was indicated at the hearing that a revision of the joint through rates on asbestos fiber to points in official territory was contemplated so as to eliminate the application of such rates on spinning grades of asbestos fibers to points such as Chicago and St. Louis. Examination of the tariffs indicates that such revision has not been effected. The claim is made that the maintenance of the present levels of rates to points such as Manville is required because of incipient motor-carrier competition, but the record is clear that the present rate structure was effected long before motor competition was a factor.

The complainants contend that the assailed rates are unjust, unreasonable, and unduly prejudicial to them, and preferential of their competitors, and they seek the prescription of joint through rates from the Canadian origins to their destinations reasonably related to the rate structure maintained to official territory. The Canadian National contends that it participates only in the proportional rates to East Alburgh, which are not subject to our jurisdiction, and prays that for this reason the complaints as to it be

dismissed. The remaining defendants likewise contend that only the rate factors southbound from Newport and East Alburgh are subject to our jurisdiction. They point out that the complainants do not assail the rates from Newport and East Alburgh only, but instead assail the combination rates, and that therefore the complaints should be dismissed.

Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear alternative with respect to their participation in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S.179; *Buckerfield's v. Atchison, T. & S. F. Ry. Co.*, 280 I.C.C. 15. We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.

The contentions of the defendants are based on the assumption that since Newport and East Alburgh are ports of entry, they are, for all practicable purposes, border points, and that the rates therefrom to the considered destinations conform to the first alternative mentioned above. The facts indicate otherwise. Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the United States. The act makes no distinction between domestic and foreign carriers in this respect. It ap-

plies to all common carriers by railroad to the extent that such transportation takes place within the United States.

While it is true, as stated by the defendants, that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary. In *Fruit Importers* v. *Atlantic Coast Line R. Co.*, 203 I.C.C. 139, 143, the defendants challenged our jurisdiction to pass upon the reasonableness of joint through rates to Canada because they had published just and reasonable rates to Rouses Point, regarded generally as a Canadian border point. Division 4 pointed out, however, that the rates to Rouses Point were local rates and that if, as the defendants contended, they were intended to apply to the Canadian border, they should have been so published in clear and unequivocal terms. In *Newsprint Paper to Detroit*, 161 I.C.C. 637, division 5 stated at page 639:

> It is between 2 and 3 miles over the routes of movement from the international boundary (the middle of the Detroit River) to the point in Detroit at which the shipments were delivered. No rate was or is published by the Michigan Central for that part of the transportation which took place within the United States. The Michigan Central admits that its failure to publish such a rate was in violation of section 6 of the act. We have under the circumstances jurisdiction to determine whether the complainant and the interveners were injured by such violation and, if so, to award damages resulting therefrom.

In *Charles S. Simpson Co.* v. *Grand Trunk W. Ry. Co.*, 129 I.C.C. 430, division 4 considered the reason-

ableness of refrigeration charges from Port Huron, Mich., an interchange point between the Grand Trunk Western and the Canadian National, to Toronto, Ontario, and Montreal, Quebec, Canada, and found them not unreasonable. In *Larrowe Milling Co.* v. *Chatham, W. & L. E. R. Co.*, 52 I.C.C. 145, which involved the charges on beet pulp from Wallaceburg, Ontario, to points in New York and New Jersey, reparation was awarded against the carriers that performed the haul within the United States, although it was stated that the haul performed by the Michigan Central Railroad Company to Suspension Bridge, N.Y., was almost wholly without the boundaries of the United States. In *Iron or Steel Wire, Buffalo, N.Y., to Kitchener, Ontario*, 294 I.C.C. 515, the respondents contended that this Commission should not take jurisdiction over rates which included hauls of only 6.04 miles within the United States to the Canadian border, the distance therefrom to the Canadian destination approximating 122 miles. The contention was rejected by division 3.

In other proceedings not concerned with the matter of rates, we have noted jurisdiction over that portion of a rail line extending south of the Canadian border even though the haul within the United States was small as compared with the total mileage. In *Hereford Ry. Co. Control*, 99 I.C.C. 7, division 4 authorized the Maine Central Railroad Company to acquire control of the Hereford Railway Company, a Canadian carrier 52.85 miles long, and to abandon that portion of the line extending 0.67 mile into Coos County, N.H. In *Status of Napierville Junction Ry. Co.*, 266 I.C.C. 471, it was found that the respondent was not a common carrier subject to part I of the act since its operations stopped at the Canadian-United States boundary, and the haul therefrom to

Rouses Point, 1.1 miles, was performed by The Delaware and Hudson Railroad Corporation.

The defendants urge that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh, but we do not perceive how this would affect the situation. We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.

As above indicated, the defendants maintain joint through commodity rates from the considered Canadian origins to numerous points in official territory. The rates shown in the appendix hereto to Ambler apply to 26 destinations on crude asbestos for distances ranging from 377 to 678 miles, and averaging 513 miles, from Danville, and from 455 to 719 miles, averaging 553 miles, from Thetford Mines; and on asbestos fiber to over 150 destinations for distances ranging from 209 to 710 miles, averaging 493 miles, from Danville, and from 314 to 788 miles, averaging 545 miles, from Thetford Mines. The range in distances on asbestos refuse and shorts is about the same as on asbestos fiber. Thus, it appears that Ambler, where asbestos products are manufactured (529 miles from Danville and 570 miles from Thetford Mines), is a representative destination in these groupings.

From Thetford Mines to Ambler, the commodity rates of 97 cents, minimum 40,000 pounds, on crude asbestos, 86 cents, minimum 40,000 pounds, on asbestos fiber, 58 cents, minimum 60,000 pounds, on refuse and shorts, and 62 cents, minimum 60,000 pounds, on waste are about 86, 80, 76, and 81 percent, respectively, of what the rates would be if constructed on a combination basis in a manner similar to that used in constructing the rates to the considered Carolina destinations. The 80,000-pound commodity rates to

Ambler on asbestos fiber, refuse and shorts, and waste are approximately 90 percent of those subject to the lower minimum weights. The rates herein found just and reasonable to Carolina destinations are constructed on a substantially similar basis. For example, the rate of $1.33 found just and reasonable on crude asbestos, minimum 40,000 pounds, from Thetford Mines to Charlotte is about 86 percent of the combination rate of $1.54. Moreover, the rates herein found just and reasonable to the Carolina destinations are substantially higher, distance considered, than the rates to numerous destinations in official territory. See, for example, the rates shown in the appendix hereto of $1.14, minimum 40,000 pounds, and $1.04, minimum 80,000 pounds, on asbestos fiber from Thetford Mines to Kirkwood (St. Louis), Mo., 1,198 miles, as compared with respective rates of $1.20 and $1.10 found reasonable herein on the same commodity from the same origin to Charlotte, 1,083 miles.

It is clear that the complainants' competitors at Ambler and other destinations in official territory are being unduly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. The rates from the Quebec Central mines generally are on a higher level to points in official territory than those from the Canadian National mines, and appear to represent reasonable maxima. Equitable treatment of the complainants would require, however, that they be accorded rate levels from the Canadian National mines which are relatively the same as those available to receivers in official territory in order to remove the undue preference and prejudice found to exist. As stated, we have no authority to prescribe for the fu-

ture joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on international traffic to the extent that the transportation takes place within the United States.

We find that the assailed rates, insofar as the transportation took or takes place within the United States, were and are unjust and unreasonable to the extent they exceeded and exceed from Black Lake, Coleraine, Thetford Mines, Danville, St. Malachie, and Warwick, rates of $1.33, minimum 40,000 pounds, on crude asbestos, and $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, on asbestos fiber to Charlotte; and from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick of $1.33 to Davidson and Marshville and $1.41 to North Charleston on crude asbestos, minimum 40,000 pounds, of $1.20, minimum 40,000 pounds, and $1.10, minimum 80,000 pounds, to Davidson and Marshville, and $1.27, minimum 40,000 pounds, and $1.16, minimum 80,000 pounds, to North Charleston on asbestos fiber; and to Davidson of 82 cents, minimum 60,000 pounds, and 74 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and of 88 cents, minimum 60,000 pounds, and 80 cents, minimum 80,000 pounds, on asbestos waste.

We further find that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered destinations exceed or may exceed the rates to Ambler, and destinations taking the same rates, by the following amounts: On crude asbestos 36 cents,

minimum 40,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 44 cents, minimum 40,000 pounds, from the latter origins to North Charleston; on asbestos fiber, 34 cents, minimum 40,000 pounds, and 31 cents, minimum 80,000 pounds, from Black Lake, Coleraine, and Thetford Mines to Charlotte, and from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton to Davidson and Marshville, and 41 cents, minimum 40,000 pounds, and 37 cents, minimum 80,000 pounds, from the latter origins to North Charleston; and to Davidson from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton, 24 cents, minimum 60,000 pounds, and 21 cents, minimum 80,000 pounds, on asbestos refuse and shorts, and 21 cents, minimum 60,000 pounds, and 18 cents, minimum 80,000 pounds on asbestos waste.

We further find that on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, the rates from Danville, St. Malachie, and Warwick, insofar as the transportation takes place within the United States, are and will be unduly prejudicial to the complainants and unduly preferential of the complainants' competitors in official territory to the extent that the rates to the considered Carolina destinations fail to reflect differentials under the rates thereto from Black Lake, Coleraine, Thetford Mines, Robertson, and East Broughton resulting from the foregoing findings which are no different than those reflected in the rates from the same respective origins to Ambler and destinations taking the same rates.

We further find that the complainants in Nos. 30846, 31683, 31685, and 31686 made shipments as described and paid or bore the charges thereon, were

damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the basis herein found to have been just and reasonable. The complainants should comply with rule 1.100 of the General Rules of Practice. In instances where shipments from Danville and Warwick were interchanged by the Canadian National at St. Johns, and no transportation within the United States was performed by that carrier, it is not liable for the payment of reparation. See *San Diego Oil Products Corp.* v. *Holton I.U.R. Co.*, 164 I.C.C. 505, 510.

To all of the rates resulting from the findings herein may be added the applicable general increases authorized on and subsequent to March 12, 1951.

An order will be entered vacating the prior order in No. 30846, and requiring the removal of the undue preference and prejudice found to exist.

Chairman Freas dissents.

Commissioners Mitchell and Goff did not participate in the disposition of this proceeding.

APPENDIX

To—	Crude asbestos				Asbestos fiber			
	From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada		From Danville, Quebec, Canada		From Thetford Mines, Quebec, Canada	
	Short-line distance	Rates,[1] minimum 40,000 pounds	Short-line distance	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds	Rates,[1] minimum 40,000 pounds	Rates,[1] minimum 80,000 pounds
	Miles	*Cents*	*Miles*	*Cents*	*Cents*	*Cents*	*Cents*	*Cents*
Manville, N.J.	480	68	521	97	68	61	86	79
Ambler, Pa.	529	68	570	97	68	61	86	79
Chicago, Ill.	907	103	987	132	85	77	101	93
Kirkwood (St. Louis), Mo.	1,118	.....	1,198	.....	97	87	114	104
Richmond, Va.	782	.....	823	.....	109	99	118	108
Charlotte, N.C.	1,042	150	1,083	184	134	131	134	131
Davidson, N.C.	1,031	149	1,072	152	134	131	134	131
Marshville, N.C.	1,068	152	1,109	156	136	133	136	133
North Charleston, S.C.	1,175	159	1,216	163	154	131	158	155

[1] On crude asbestos to Charlotte, Davidson, Marshville, and North Charleston the carload minimum weights are 40,000 pounds to East Alburgh or Newport, Vt., and 80,000 pounds beyond. On asbestos fiber the minimum weights to the same points are 40,000 or 80,000 pounds to East Alburgh or Newport, and 80,000 pounds beyond.

APPENDIX D

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 7th day of May, A.D. 1958

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

SAME

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

These proceedings being at issue upon complaints and answers on file, and having been duly heard and

submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and the prior report in No. 30846, 288 I.C.C. 793, are hereby referred to and made a part hereof; and the Commission having found in the report of even date that the rates on crude asbestos, asbestos fiber, and asbestos refuse, shorts, and waste, in carloads, from Black Lake, Coleraine, Thetford Mines, Robertson, East Broughton, Danville, St. Malachie, and Warwick, Quebec, Canada, to certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants and unduly preferential of the complainants' competitors to the extent indicated in said report of even date:

It is ordered, That the defendants named in the complaints, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to cease and desist, on or before August 14, 1958, and thereafter to abstain, from practicing the undue prejudice and preference referred to in the preceding paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation within the United States, be, and they are hereby, notified and required to establish, on or before August 14, 1958, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed under section 6 of the Interstate Commerce Act, and thereafter to maintain and apply, rates, regulations, and practices which will prevent and avoid the undue prejudice and preference referred to in the first paragraph hereof.

And it is further ordered, That the order of May 25, 1953, in No. 30846, be, and it is hereby, vacated and set aside, and that this order shall continue in force until the further order of the Commission.

By the Commission.

[SEAL] HAROLD D. McCOY,
Secretary.

APPENDIX E

ORDER

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 11th day of March, A.D., 1959

No. 30846

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31683

RAYBESTOS-MANHATTAN, INC., GENERAL ASBESTOS AND RUBBER DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31684

THERMOID COMPANY, SOUTHERN DIVISION

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31685

UNION ASBESTOS & RUBBER COMPANY

v.

SAME

No. 31686

CAROLINA ASBESTOS COMPANY

v.

SAME

It appearing, That the Commission, Division 3, issued its report in No. 30846, 288 I.C.C. 793, decided

May 2, 1953, and the entire Commission issued its report in the above-entitled proceedings, including No. 30846, on further hearing, 303 I.C.C. 743, decided May 7, 1958;

It further appearing, That defendants on February 20, 1959, filed a petition for leave to file a petition seeking reopening and reconsideration and concurrently therewith filed a petition, dated February 20, 1959, for reopening and reconsideration in the above-entitled proceedings; and reply of complainants, dated March 12, 1959;

Upon consideration of the record in the above-entitled proceedings and the foregoing pleadings:

It is ordered, That the petition for leave to file be, and the same is hereby, granted, and that the petition for reconsideration be, and the same is hereby, filed of record.

It is further ordered, That the petition for reopening and reconsideration be, and the same is hereby, denied, for the reason that the findings of fact and conclusions in the report of the Commission are fully supported by the evidence and that the matters set forth in the petition do not constitute sufficient grounds to warrant the action sought.

And it is further ordered, That the report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act and to the award of reparation.

By the Commission.

[SEAL] HAROLD D. McCOY,
Secretary.

APPENDIX F

STATUTES INVOLVED

Section 1(1) (a) and (2) (49 U.S.C. § 1(1)(a) and (2)).

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment;

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

Section 1(4) (49 U.S.C. § 1(4)):

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and

classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 1(5) (49 U.S.C. § 1(5)).

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1) (49 U.S.C. § 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrim-

ination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6(1) (49 U.S.C. § 6(1)).

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 6(7) (49 U.S.C. § 6(7)).

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

JAMES R. BROWNING, Clerk

No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission, Washington 25, D.C.

FEBRUARY 1961

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 258

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the District Court (R. 241–253) is reported at 182 F. Supp. 516. The decision of the Interstate Commerce Commission dated May 7, 1958 (R. 60–79) is reported at 303 I.C.C. 743. The orders of the Commission dated May 7, 1958 (R. 80–81) and March 11, 1959 (R. 239–240) are not reported.

JURISDICTION

The judgment of the District Court was entered on March 7, 1960 (R. 241, 253). A motion for reconsideration, timely filed, was denied on March 26, 1960 (R. 261). Notice of Appeal by the Commission was filed in the District Court on May 24, 1960

(R. 267), and probable jurisdiction was noted on October 17, 1960 (R. 272). The jurisdiction of the Court upon appeal rests on 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

Sections 1 (1)(a) and (2), 1(4), 1(5); 3(1); 6(1), 6(7); 8; 16 (1) and (2) of the Interstate Commerce Act, 49 U.S.C. 1 (1)(a) and (2), 1(4), 1(5); 3(1); 6(1), 6(7); 8; 16 (1) and (2). Pertinent portions of these sections of the Interstate Commerce Commission are reproduced in the Appendix, *infra*, pages 46–50.

QUESTIONS PRESENTED

Asbestos moves from origins in Canada to consignees in official territory on single-factor joint through rates over the lines of Canadian and American rail carriers which meet at interchange points within the United States. Asbestos moves from the same Canadian origins and through the same interchange points to competing consignees in southern territory on combination through rates at a higher level, made over a point within the United States, consisting of (1) a proportional rate from the Canadian origins to the interchange points in the United States and (2), local rates from such interchange points to the south.[1] The following questions are presented by this appeal:

[1] There is one exception. The applicable combination through rate on asbestos waste from Danville, Quebec, Canada, to the points in the south is made over Baltimore, Maryland, and consists of a joint through rate from Danville to Baltimore and class or commodity rates beyond. (R. 64, 65.) Although conceding the Commission's power over joint rates, (R. 246) never-

(1) Whether the District Court erred in failing to sustain the Commission's determination that the participation of rail carriers operating within the United States in single-factor joint through rates to points in official territory, while participating in combination through rates made over points within the United States on a substantially higher level, for like service from the same Canadian origins to points in the south, was unduly prejudicial to receivers in southern territory and unduly preferential of competing receivers in official territory, in violation of section 3(1) of the Interstate Commerce Act, 49 U.S.C. sec. 3(1).

(2) Whether the District Court erred in holding that the Interstate Commerce Commission lacked power to determine the reasonableness and justness of the entire combination through rate between the Canadian origins and points in the southern territory made over points within the United States.

STATEMENT

The Central Vermont Railway, Inc. and numerous other rail carriers, including the Quebec Central Railway Company and the Canadian National Railway Company, (hereinafter referred to as the rail carriers) which operate in the United States, and which participate in the movement of crude asbestos and asbestos fiber from producing points in Canada to points in the United States, brought this action to set aside the report and order of the Commission dated

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theless, even as to these rates applying on asbestos waste, the judgment of the District Court prevents any remedial action by the Commission.

May 7, 1958 (R. 60–81), as clarified by the order of the Commission entered March 11, 1959 [2] (R. 239–240).

Crude asbestos and asbestos fiber are produced at points located in the Province of Quebec, approximately 100 miles or less north of the United States-Canadian border.[3] Asbestos is shipped from these origin points over the lines of the Quebec Central Railway Company and the Canadian National Railway Company (hereinafter called the Canadian lines) and connecting United States rail carriers to points in the United States located in official territory [4] such as Chicago, Ill., Ambler, Pa., and Manville, N.J., and to destinations in the southern territory such as Charlotte, Davidson and Marshville, N.C., and North Charleston, S.C.

The Canadian and United States rail carriers have established and maintain applicable single-factor joint through rates [5] on asbestos from the Canadian origins

[2] The order of March 11, 1959, among other things, dispelled any doubt that the method of adjusting rates to remove the unlawful discriminations was left to the option of the rail carriers. *Texas & Pacific Ry Co.* v. *United States*, 289 U.S. 627, 650.

[3] The following producing origin points are located on the line of the Quebec Central Railway Company: Black Lake, Coleraine, Thetford Mines, Robertson and East Broughton. The following producing origin points are located on the line of the Canadian National Railway Company: Warwick, Danville and St. Malachie.

[4] Official territory, broadly speaking, lies east of the Mississippi River and north of the Potomac and Ohio Rivers. *Class Rate Investigation, 1939*, 262 I.C.C. 447, 457.

[5] A joint rate is a rate which extends over the lines of two or more carriers and is made by arrangement or agreement

to points in official territory. Asbestos moving from the same Canadian origins to destinations in southern territory is treated differently, ratewise, by the rail carriers.[6] Through shipments of asbestos to points in the southern territory move on combination through rates[7] made over points within the United States which are on a higher level for like service. These are composed of the following factors: (1) a proportional rate[8] restricted to apply only on traffic destined to points in the United States, published by the Canadian carriers from the origin points in Canada to East Alburgh and Newport, Vt., both of which happen to be customs ports of entry; and (2) class rates or commodity rates[9] maintained by the United

between the carriers and is evidenced by concurrence or power of attorney.

[6] The one exception is asbestos waste from Danville to points in the south. See footnote 1, *supra*.

[7] The term "through rate" is construed to mean the total rate from point of origin to destination. It may be a local rate, a joint rate, or a combination of separately established rates (49 C.F.R. 141.0(5) Regulations of the I.C.C. for the Filing of Freight Rate Schedules).

[8] A "proportional rate" is a part of a through rate, *Hocking Valley Ry. Co.* v. *Lackawanna Coal & Lumber Co.*, 224 Fed. 930, 931, and is a rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies, or (2) a subsequent transportation from a point to which the proportional rate applies, (3) or both, cf. *Addy* v. *Michigan Central R. Co.*, 269 I.C.C. 683, 686.

[9] "Class rates" are rates that apply on several classes of traffic specified in the controlling classification or published exceptions thereto. A *commodity rate* is published to apply on a specific commodity or group of commodities, generally described in the tariff containing the rate, as distinguished from a class rate. *New York* v. *United States*, 331 U.S. 284, 290, fns. 1–3.

States carriers to points in southern territory such as Charlotte, Davidson and Marshville, N.C., and North Charleston, S.C. East Alburgh and Newport, Vt. are located three and five miles south of the international boundary, respectively.

The proceeding was instituted before the Commission by receivers located in North and South Carolina, who are engaged in the manufacture, sale and distribution of asbestos products and who are adversely affected by this rate disparity.[10] Their complaints before the Commission (R. 18–24, 32–57) allege: (1) that the rates charged by the rail carriers for the transportation of crude asbestos and asbestos fiber from the Canadian mines to the southern destination points were and are unreasonable and unjust in violation of sections 1 and 2 of the Interstate Commerce Act (49 U.S.C. sections 1 and 2); and (2) that the rail carriers violated section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)) by the maintenance of unduly prejudicial rates on asbestos from the Canadian mines to the shippers in southern territory and unduly preferential rates on the same commodities from the same origin points to their competitors in official territory.

After appropriate proceedings, the Commission issued its report of May 7, 1958 (R. 60–81) in which it found the rates to be both unduly preferential and prejudicial, in violation of Section 3(1), and unjust

[10] The first complaint was filed with the Commission on June 22, 1951, and similarly affected receivers filed complaints on December 6 and 13, 1954. In all, the consolidated proceeding before the Commission involved five separate complaints by adversely affected southern receivers.

and unreasonable under Section 1 (4) and (5) of the Act. It ordered the carriers to establish rates for shipments to the complainants' plants in southern territory which would not exceed the rates to points in official territory by more than specified amounts.[11] The Commission found that "the complainants * * * made shipments as described and paid or bore the charges thereon, were damaged, and are entitled to reparation in the amount of the difference between the charges collected and those that would have accrued on the bases * * * found to have been just and reasonable" (R. 78). On March 11, in denying petitions for reconsideration, it clarified its prior order so as to make clear that the carriers were left with alternatives in removing the discriminations violative of Section 3(1) (R. 239–240).

On March 12, 1959, the rail carriers instituted an action in the District Court seeking to set aside the report and order of the Commission entered May 7, 1958.[12] Thereafter, on March 7, 1960, the District

[11] For example, using Thetford Mines as a representative origin point, the Commission found (R. 75) that the commodity rates of 97 cents, minimum 40,000 pounds on crude asbestos, and 86 cents, minimum 46,000 pounds on asbestos fiber, are about 86 percent and 80 percent respectively of what the rates would be if constructed on a combination basis similar to that used in constructing rates to the prejudiced southern destinations. In this situation the southern receivers are being charged rates at levels (Rate per mile) which are from 15 to 20 percent higher than the rate level applicable to the preferred points in official territory.

[12] On April 6, 1959, a group of southern rail carriers was permitted by the District Court to withdraw as parties plaintiff from the suit. These were the Alabama Great Southern Railroad Company; Atlantic Coast Line Railroad Company; Cin-

Court rendered its opinion and order, setting aside and annulling the orders of the Commission and remanded the cause to the Commission for further proceedings in conformity with its opinion (R. 241–253). The District Court held, in substance, that the *application* of the proportional rate factor embraced in the combination through rate applicable to asbestos from origins in Canada to southern points within the United States constitutes a bar to the Commission's jurisdiction to determine the reasonableness of the through rate. The District Court did not discuss the Commission's findings of undue prejudice and preference under section 3(1) of the Act. The District Court's attention was directed to this issue by the appellants in a motion for reconsideration (R. 203). This was denied by order of the court without opinion on March 26, 1960 (R. 261).

SUMMARY OF ARGUMENT

I

The appellee rail carriers apply single-factor joint through rates on asbestos and related commodities from origin points in Canada to receivers in official territory. At the same time, these rail carriers also participate in combination through rates made over points within the United States applicable to the same commodities from the same Canadian origin points to competing receivers located in southern territory.

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cinnati, New Orleans & Texas Pacific Railway Company; New Orleans and Northeastern Railroad Company; Norfolk Southern Railway Company; Seaboard Air Line Railroad Company; and the Southern Railway Company.

The combination through rates are on a substantially higher level than the single-factor joint rates, although the transportation services rendered to the competing receivers by the rail carriers were similar. The Commission found that this disparate rate treatment created an unlawful rate relationship, in violation of section 3(1) of the Interstate Commerce Act, which unduly preferred receivers in official territory and unduly prejudiced their competitors in southern territory. The Commission required the rail carriers "according as they participate in the transportation within the United States * * * to cease and desist * * * from practicing the undue prejudice and preference."

The order of the Commission promulgated under section 3(1) of the Interstate Commerce Act is a valid exercise of its authority to prevent the rail carriers from continuing an unlawful rate relationship between competing receivers within the United States. The contention that the Commission's lack of jurisdiction over the foreign portion of the transportation also prevents it from requiring the removal of the discriminatory rate practices is completely invalid where, as here, the Commission's order is enforceable against the rail carriers operating within the United States which voluntarily participate in the unlawful rate relationship, and which are able to cut short its continuance. The mere fact that international traffic is involved does not enable the rail carriers to inflict an unduly prejudicial-preferential rate relationship upon competing shippers within the United States.

II

The southern receivers which are adversely affected by the unlawful rate relationship maintained by the rail carriers on asbestos also assailed the lawfulness of the combination through rates made over interior points within the United States which were the only applicable rates on this traffic. The Commission found the assailed rates, insofar as the transportation takes place within the United States, unjust and unreasonable, in violation of section 1 of the Interstate Commerce Act, 49 U.S.C. section 1, and that the complaining receivers were entitled to reparations.

The court below set aside the action of the Commission on the theory that the Commission possessed no jurisdiction over the foreign factor of a combination international rate. The fact that the combination through rates include factors covering transportation in Canada does not preclude the Commission from exercising its jurisdiction under section 1 of the Act to determine whether the combination through rates made over a point within the interior of the United States are just and reasonable.

The court below predicated its theory of the case upon the assumption that Newport and East Alburgh, Vt., the points over which the combination through rates are made, should be regarded as located on the border. Admittedly, the rail carriers operating within the United States could not be held responsible for the unlawfulness of the combination through rates if, in fact, such rates applied to and from the international boundary. However, no such rates were published by the rail carriers applicable on this through

traffic from origins in Canada to the receivers in the South. Had such rates been in existence, and none were alleged, it would have been the duty of the rail carriers to produce them. Further, the Commission expressly found that Newport and East Alburgh, Vt., were not on the border but were three to five miles below the border, and that the Canadian carriers performed substantial transportation within the United States.

Since there were no applicable rates published by the rail carriers to and from the international boundary, the adversely affected receivers were justified in attacking the actual rates applied for all of the transportation rather than some fictitious, nonexistent rate from the boundary. In this connection, this Court has recognized that the shippers' interest is in the total charge for the service rendered rather than the separate factors of the through rate which go to make up the total charge. *Great Northern Ry. v. Sullivan*, 294 U.S. 458. Therefore, it was incumbent upon the shippers to challenge the entire combination through rate, and it was proper for the Commission to determine the lawfulness of this rate as an incident of its power over that portion of the transportation which takes place within the United States

Lack of control over the foreign portion of the transportation is of no legal significance, where, as here, the rail carriers participate in through routes and either (1) joint through rates or (2) through combination rates based on points within the United States. Liability for the maintenance of such unlawful through rates attaches regardless of the method

of rate publication, and all of the participating rail carriers within the United States are subject to the order of the Commission.

ARGUMENT

I

Pursuant to Section 3(1) of the Interstate Commerce Act the Commission possesses jurisdiction to determine that the participation of rail carriers operating within the United States in single-factor joint through rates to points in official territory while participating in combination through rates made over points within the United States on a higher level for like service from the same Canadian origins to points in the south, was unduly prejudicial to receivers in southern territory and unduly preferential of competing receivers in official territory

The Commission's report of May 7, 1958 (R. 60), found that the involved rates were unlawful on two grounds: (1) that they were unduly prejudicial to the complaining receivers and unduly preferential of their competitors in official territory, in violation of section 3(1) of the Interstate Commerce Act, and (2) that the assailed rates were unjust and unreasonable in violation of section 1 of the act.[13] On the same date, the Commission issued an order under section 3(1) of the Act in which it found that the rates on crude asbestos from the Canadian origins to "certain destinations in the United States, are and for the future will be, unduly prejudicial to the complainants [southern receivers] and unduly preferential of the complainants' competitors to the extent indicated in

[13] The Commission also found that the complaining receivers had been damaged as a result of the maintenance of unlawful rates by the rail carriers and reparation was awarded.

said report of even date" (R. 81). Accordingly, it ordered the defendant rail carriers, to the extent that they participated in the transportation of asbestos within the United States, to cease and desist from practicing the unlawful rate discriminations[14] (R. 81).

The District Court completely overlooked the fact that the order of the Commission entered May 7, 1958, was an order promulgated under section 3(1) of the Act. It treated the matter as one arising solely under the provisions of section 1 of the Act and restricted its considerations to "a single question * * * Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States" (R. 242). In resolving this question adversely to the Commission, the District Court simply held "that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of inter-

[14] The order of the Commission dated March 11, 1959 (R. 239–240), pointed out that:

> * * * The report and order of the Commission in these proceedings is hereby clarified to provide that the finding in the Commission's report that the rates from Quebec Central Mines to points in official territory which "appear to represent reasonable maxima" relates only to the finding of unreasonableness in the past under section 1 of the Interstate Commerce Act and to the award of reparation.

This left to the rail carriers the right to determine how the rates should be adjusted to remove the unlawful discriminations. *Texas & Pacific Ry. Co. v. United States*, 289 U.S. 627.

change is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate" (R. 253).

Assuming that this question may be relevant in determining the validity of the Commission's finding that the assailed rates were unjust and unreasonable under section 1 of the Act, it has no relevance to the Commission's separate finding under section 3(1) of the Act of the existence of an unduly prejudicial-preferential rate relationship and the requirement of its elimination. "Both rates may lie within the zone of reasonableness and yet result in undue prejudice." *United States* v. *Illinois Central R. Co.*, 263 U.S. 515, 524. However, the District Court apparently viewed the single question as stated by its as dispositive of both phases of the case, for its opinion contains no discussion of the section 3(1) issue, and it denied a motion for reconsideration which pointed out its failure to treat with the separate issue of undue prejudice and preference under that section (R. 253–261).

The evidentiary basis for the Commission's finding of the existence of an unduly prejudicial-preferential rate relationship is not challenged by the rail carriers.[15] Instead, they urge, in effect, that the Commis-

[15] As the Court below noted in its opinion, "* * * plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if those rates are to be viewed as an indivisible entity. Plaintiff's argument before this court is confined to the contention that the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas" (R. 244–245).

sion's lack of jurisdiction to determine the lawfulness of the assailed rates under section 1 of the Act also prevents the Commission's exercise of authority under section 3(1) of the Act where the complainants fail to assail the local rate factors from Newport and East Alburgh, Vt., to the southern destination points. However, "proceedings to remove unjust discrimination are aimed directly only at rate relations," *United States* v. *Illinois Central Ry. Co., supra,* p. 520, *St. Louis S.W.R. Co.* v. *United States,* 245 U.S. 136, 145.

While the Commission may not have authority to compel the establishment of international single-factor joint rates for the future, nevertheless, "the prohibition of the third section * * * is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers * * *." *East Ten. etc. Ry. Co.* v. *Interstate Commerce Commission,* 181 U.S. 1, 18. Where, as here, the carriers voluntarily have entered into single-factor joint through rates from Canadian origins to points in official territory,

> * * * we entertain no doubt that our control over them empowers us to require them to cease and desist from participating in an existing joint rate, or to find their participation in a proposed joint rate not justified, if we find such rates are or will be unreasonable or otherwise unlawful. *The fact that a portion of the transportation takes place within a foreign country might make proof of unlawfulness more difficult. But proof should not be confused with responsibility.* [*Cyanamid and*

Cyanide from Niagara Falls, 155 I.C.C. 488, 491–492] [Emphasis supplied]

The fact that the traffic involved in this case originates in Canada does not nullify the power of the Commission under section 3(1) of the Act to require domestic rail carriers which effectively participate in a major portion of the through transportation (R. 75) to cease and desist from perpetuating the unlawful rate relationship, especially when, as here, the preferred lower rates to official territory are single-factor *joint* through rates in which they expressly concur.

The contention of the rail carriers is invalid on its face for another reason. In the instant case, a through route was established to these southern points over which combination rates made over points in the United States applied, and the transportation is performed as a result of this arrangement between the carriers, express or implied. "Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove unjust discrimination exists in both classes of cases." *United States* v. *Illinois Cent. Ry. Co., supra*, p. 527. Thus, in *St. Louis, Brownsville & Mexico Ry. Co. et al.* v. *Brownsville Navigation District et al.*, 304 U.S. 295, 300, this Court held that:

> * * * *The Act extends to transportation only so far as it takes place in this country.* Petitioners are not bound by any law, regulation, or tariff to furnish cars for transportation in Mexico. *But that freedom from obligation*

does not imply that, in furnishing equipment for transportation beyond the boundary, petitioners may unreasonably discriminate between shippers, places, or classes of traffic within the United States. Cf. *Lewis-Simas-Jones Co.* v. *Southern Pac. Co.*, 283 U.S. 654. [Emphasis supplied.]

In *Mayo Shell Corp.* v. *Baltimore & O. R. Co.*, 297 I.C.C. 133, a case substantially similar to the instant proceeding, except that the transportation was in the reverse direction, and the combination rates broke on the border, the Commission pursuant to section 3(1) of the Act required the rail carrier defendants to remove the unlawful discrimination existing against the movement of oyster shell from Houston, Tex., to points in Canada. The facts indicated that shippers at Houston were unduly prejudiced by the application of a combination through rate on a higher level to points in New England and eastern Canada, and that competing shippers at Berwick and Morgan City, La., were unduly preferred by the application of a lower single-factor joint through rate to the same destination. The Commission stated at page 135:

> The duty of a carrier to give substantially equal treatment to all shippers who are in a position to demand it includes the right to reach competitive markets on relatively equal terms. A rate preference may not be accorded a shipper without a material difference in transportation conditions justifying the preference. An unjustified difference in freight rates that are factors in the competition between shippers constitutes undue prejudice and preference

> where, as here, the rates are under the effective control of the participating carrier or carriers.
> * * *

With respect to that portion of the transportation in Canada, the Commission as it did in the instant case simply held (p. 135):

> Portions of the transportation at the assailed rates occur in Canada, and several of the defendants are Canadian carriers. We have jurisdiction only over such of the transportation as takes place within the United States, and our order herein will be directed only against the defendant carriers engaged in such transportation.

See also *Consolidated Mining & S. Co. of Canada* v. *N.Y.C. R. Co.*, 299 I.C.C. 231, where the Commission held that even a Canadian shipper was entitled to nondiscriminatory rates under section 3(1) of the Act. In the latter case, the Commission found that the Canadian shipper at Tadanac, British Columbia, 6.75 miles north of the international border, was unduly prejudiced by the assessment of charges based upon a combination through rate over United States points on a higher level to eastern United States points, and that competing shippers at Bradley, Idaho, and Anaconda, Mont., were unduly preferred by the application of a lower single-factor joint through rate to the same destinations.[16]

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[16] The Commission also said in the *Consolidated Mining* case (p. 244):

> The fact that Tadanac lies beyond the international boundary and other circumstances incidental thereto but which do not concern the service under the rates considered

In the instant case, the Commission, after comparing the rate relationship existing between the complaining receivers in the south and competing receivers in official territory, the competitive factors, and after making appropriate findings regarding the intrinsic merits of the two rate levels, held (R. 76):

> It is clear that the complainants' competitors at Ambler and other destinations in official territory are being unduly preferred to the undue prejudice and disadvantage of the complainants, and that the assailed rates are and have been unjust and unreasonable in relation to the widespread rate adjustments maintained elsewhere from the Canadian origins to destinations in the United States. * * * As stated, we have no authority to prescribe for the future joint through international rates from origins in Canada, but we may order the removal of any unlawfulness in rates on in-

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herein, are not germane to the issues. Nor does the fact, also stressed by defendants and interveners, that shipments have continued to move from Tadanac to the destination territory in substantial and increased volume despite the rate disparity complained of rebut the showing of undue preference and prejudice. A patent discrimination in rates is not to be condoned because other competitive advantages and disadvantages wholly unrelated to the service of transportation may favor a shipper complaining of such discrimination. When sales are made under keen competition in common markets, as they are here, the correlative of the advantage gained from the lower rate level must be a detriment or injury to a competitor who must ship on the higher level. *Northeast Kentucky Coal Bureau* v. *Chesapeake & O. Ry. Co.*, 201 I.C.C. 165, 206 I.C.C. 445; sustained in *Chesapeake & O. Ry. Co.* v. *United States*, 296 U.S. 187. Compare *Illinois Central R. Co.* v. *United States*, 101 F. Supp. 317, 323.

ternational traffic to the extent that the transportation takes place within the United States."[17]

Since these carriers are the "common source of the discrimination" an "order for correction of the disparity," may "run against * * * them." *Texas & Pacific Ry. Co.* case *supra*, 289 U.S. at 650. See also *Ayrshire Corp. v. United States*, 335 U.S. 573, 594.

The rail carriers operating within the United States which participate in the transportation of asbestos originating at the Canadian mines are unlawfully discriminating against the southern shippers by the participation in single factor through joint rates on a substantially lower level to competing receivers in official territory, thereby refusing to accord substantially the same or equal rate treatment to the adversely affected southern shippers. "While the carriers may therefore, meet competition by equalizing rates or maintaining differentials both to interior points and to ports, they may not adjust their rates with the motive of injuring or aiding a shipper, a particular kind of traffic, or a locality, for so to do is to depart from the transportation standard, conformity to which the Act contemplates, and substitute others which are prohibited. A tariff published for the purpose of destroying a market or building up one, of diverting traffic from a particular place to the injury of that place, or in aid of some other, is

[17] The Commission report also notes (R. 71) that the defendant rail carriers "admit * * * that to numerous points in official territory here alleged to be preferred, delivery cannot be effected without their participation."

unlawful." *Texas & Pacific Ry. Co. v. United States,* 289 U.S. 627, 637."

The Commission's lack of power over the transportation of asbestos moving within Canada does not affect its jurisdiction over the transportation of this commodity by rail carriers once it crosses the international boundary into the United States. *Texas & Pacific Ry. Co.* v. *United States,* 289 U.S. 627, 636. "The principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations." *New York* v. *United States,* 331 U.S. 284, 296. Section 3(1) of the Act was designed to prevent unlawful rate discriminations such as those existing in the present case. The failure of the lower court to sustain the Commission's orders in this respect would frustrate the "great purposes of section 3(1)." *New York* v. *United States,* 331 U.S. 284, 315. As applied to international traffic, the effect of the district court's opinion is to immunize from regulation precisely what section 3(1) of the Act has empowered the Commission to prevent, i.e., undue and unreasonable prejudice and disadvantage between shippers and territories. In addition, it will enable the rail carriers to extend this form of rate discrimination proscribed by the Congress to other international traffic. Thus, the opinion of the lower court creates a large loophole in

[16] Although the defendant rail carriers alleged before the Commission that the disparity in rate treatment resulted historically from water competition, they were unable to adduce evidence in support of this assertion, and the Commission specifically found that: "There is no indication that water competition has any bearing on the maintenance of the present adjustment * * *." (R. 71).

the law, contrary to the intent and purpose of the Interstate Commerce Act.

> * * * If the hands of the Commission are tied and it is powerless to protect regions and territories from discrimination unless all rates involved in the rate relationship are controlled by the same carriers, then the 1940 amendment to § 3(1) fell far short of its goal. We do not believe Congress left the Commission so impotent. (*New York* v. *United States*, 331 U.S. 284, 342–343)

For these reasons the order of the Commission promulgated under section 3(1) of the Act is valid in all respects and should be sustained.

II

The District Court erred in holding that the Commission lacks jurisdiction to determine under Section 1 of the Interstate Commerce Act that a combination rate on through traffic from Canadian origins to destinations in the southern States was unjust and unreasonable "insofar as the transportation took or takes place within the United States"

A. Preliminary statement on jurisdictional issues

The brief filed by the United States in this case urges reversal of the decision below insofar as it sets aside the Commission's orders of May 7, 1958, and March 11, 1959, to the effect that the maintenance by the appellee carriers of joint rates from Canadian points of origin to shippers in official territory at a lower level than the combination rates from such origins to shippers at points in the southern States, violates section 3(1) of the Interstate Commerce Act.

The Commission concurs entirely with this position of the Department of Justice.

However, fn. 5 in the brief of the United States suggests that the issue of the appellee's liability for reparations, and the underlying basis for the Commission's determination that appellees were liable for reparations—i.e., that the combination rates to southern consignees were unjust and unreasonable under section 1(5) of the Interstate Commerce Act, were not properly in issue before the three-judge court below or in this Court upon direct appeal. The lower court itself stated, citing 28 U.S.C. 2321 and 49 U.S.C. 16(2), that "We are, of course, without authority to consider the validity of the Commission's orders allowing reparations; * * *" (R. 244). At the same time, that court proceeded to hold that the Commission lacked jurisdiction over the rates involved, without confining its reasoning to the Commission's order based upon section 3(1).

Under 28 U.S.C. 2321, three-judge district courts are without jurisdiction to review orders of the Commission for the payment of money. Section 16(2) of the Interstate Commerce Act provides that a Commission order for payment of reparations is enforceable by suit upon such order in the one-judge federal district court or in a state court. *United States* v. *I.C.C.*, 337 U.S. 426, 442–443 holds that a Commission order denying reparations should be reviewed by a one-judge district court. Typically, when the Commission determines that a rail carrier is liable for reparation, it directs the complainant to comply with Rule 1.100 of its General Rules of Practice (as it did

in the instant case (R. 78)). Upon compliance with that Rule, which is designed to obtain agreement as to the amount of reparation, the Commission enters a formal order directing the carrier to pay a specified sum of money. If the carrier refuses to pay, it is upon this order that the shipper brings suit under section 16(2).

In the present case, the railroad appellees' challenge to the Commission's order based upon section 3(1) was properly reviewed by a three-judge district court, with a direct appeal to this Court. Although, as the United States points out in its brief (pp. 8–9), the question which the court below purported to decide is not relevant to the section 3(1) issue, it is relevant to the issue of reasonableness of rates which underlies the Commission's determination that the appellee railroads were liable for reparations—notwithstanding that court's disavowal of jurisdiction "to consider the validity of the Commission's orders allowing reparations."

Whether the three-judge court below, notwithstanding its disclaimer, could have determined a question which is relevant only to the issue of reparations, depends upon (1) whether consideration of such a question is premature until the Commission issues a specific reparations order following compliance with its Rule 1.100, and (2) whether questions relating to liability for reparations must be severed from the section 3(1) issues (as to rates for the future) to be triable only in an action brought by the shipper under section 16(2). To permit the railroad appellees to challenge in a single action before a three-judge court

all of the issues which the Commission resolved against them, would certainly be convenient for them and, perhaps, for other parties. By analogy, in *Magnet Cove Barium Corp.* v. *United States,* 175 F. Supp. 473, affirmed 361 U.S. 32, a shipper was permitted to challenge in a three-judge court a Commission order which both denied reparations on past shipments and refused to prescribe rates for the future. Contra, *Shippers Car Supply Committee* v. *United States,* 160 F. Supp. 939, affirmed 358 U.S. 45, in which the denial of reparations was separately reviewed by a single judge.

In terms of the present case, our immediate concern, if this Court concurs in the suggestion of the United States, is that nothing in the opinion of the court below shall stand as *res judicata* on issues relating solely to reparations if those issues are later presented to another forum—as in a suit by a shipper under section 16(2). In that event, we submit that the decision below should be vacated insofar as it determines issues which are relevant only to reparations. On the other hand, if this Court rejects the suggestion of the United States, we contend below that the lower court erred in holding that the Commission lacked jurisdiction to determine the reasonableness of the rates in question.

B. The merits

In this case, the Commission had before it the formal complaints of shippers which placed in issue the lawfulness of the entire combination through rate made over interior points within the United States.

Both factors of this combination through rate were filed with the Commission by the rail carriers, and were made applicable on this traffic (asbestos and related commodities) from Canadian origins to destinations in the South. The receivers also requested the prescription of lawful rates for the future and for the award of reparations on shipments made during the statutory period of limitations (R. 62–63). The Commission for many years has uniformly held [19] with respect to similar complaints raising section 1(4) and 1(5) issues that:

> Where a through rate is made up of separately established components, the lawfulness for the future of any of the components independent of the other, may be passed upon, *but where there is an issue as to reparation on past shipments the total through charges must be considered.* See *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458. [*Bell Oil & Refining Sales Co.* v. *Denver & R.G.W.R. Co.*, 277 I.C.C. 135, 138 (1950).] [Emphasis supplied.]

This rule of law was firmly established by the Commission in 1916 when it held in *Stevens Grocer Company, et al.* v. *St. L., I.M. & S. Ry. Co.*, 42 I.C.C. 396, 398: [20]

> * * * It is important that the true rule be definitely announced and that a uniform policy be

[19] With minor exception cf. *Cairo Board of Trade* v. *C.C.C. & St. L. Ry. Co.*, 46 I.C.C. 343 (1917), which involved a separately established *reshipping* rate on grain and grain products. Such rates apply to a *fictional through movement* from points where grain is reshipped after being stopped and stored. See also *Allendale Grocery Co.* v. *Charleston & W.C. Ry. Co.*, 147 I.C.C. 131, 134 (1927).

[20] The rate charged in the *Stevens Grocer Co.* case was "on

established under which parties complainant and defendant may understand what is required. *We now lay down the rule, which for the future will be strictly adhered to, that when a complaint involves charges applicable to a through shipment the through rate or charge must be brought in issue and the participating carriers must be made defendants. When the through rate or charge is made up of separately established rates or charges, applicable to the through business, the through rate or charge must be attacked as violative of the act, although the violation may be believed to be occasioned by a particular factor or factors thereof;* in such case the complainant should be prepared at the hearing to prove the unlawfulness of the through rate itself and that this is due to a particular factor or factors. * * *

* * * * *

Proportional rates are necessarily parts of through rates and differ from local rates used as parts of through rates in that before the proportional rate may be attacked at all there must be an allegation that the through rate is unreasonable because of the unreasonableness of the particular proportional rate; whereas local rates, as such, may be attacked separately when used separately. *The Interior Iowa Cities Case,* 28 I.C.C. 64. [Emphasis supplied.]

The Commission went on to hold that:

Local rates, however, when used as parts of through rates partake of the nature of propor-

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the basis of combinations of intermediate rates [local and proportional rates] based on Memphis." 42 I.C.C. 396.

> tional rates, and may be regarded as, in effect, local and proportional rates. * * * So far as they are strictly local rates they may, of course, be brought in question without questioning the propriety of any other rate; in so far as they are used in through transportation they should be treated as other proportional rates and may not be considered unless the through rate be attacked as a whole.

The rule requiring that the through rate be put in issue where the complaint involves charges on through shipments has been uniformly applied to international traffic. *Great Northern Ry.* v. *Sullivan*, 294 U.S. 458; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654; *News Syndicate Co.* v. *N.Y.C. RR.*, 275 U.S. 179.[21] Since the receivers' only interest is that the charge shall be reasonable as a whole, the complaints properly put in issue the applicable combination through rate.

In restricting itself to the question whether the Commission has jurisdiction "over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin

[21] In *E. A. Brown Produce Co.* v. *Atchison, T. & S.F. Ry. Co.*, 278 I.C.C. 433, the Commission held at p. 436:

> * * * Whether the movement is domestic or international, the through charge to the shipper, and not divisions of the joint through rate nor the individual factors composing a combination rate, is what determines the reasonableness of the through rate. See *Great Northern Ry.* v. *Sullivan*, *supra*, wherein, in annulling an award of reparation of this Commission based upon a finding of unreasonableness in the domestic factor of an international combination rate, the Court said:

to a border interchange within the United States" (R. 242) the District Court misconceives the rate situation before the Commission. The District Court adopted the argument of the rail carriers that "the Commission exceeded its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas" (R. 244–245). When the District Court accepted this premise, it simply disregarded the fact that the assailed rates which are the only *applicable* rates on this through traffic from the Canadian origins to points in the South consisted of combination through rates made over interior points within the United States. The District Court thereupon proceeded to treat the rate situation as though the rail carriers had in fact made available to the complaining receivers a rate applicable from the international boundary line on this through traffic moving from the Canadian origins to the south. This is the same theory which this Court rejected in *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.*, 283 U.S. 654. There

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"The shipper's only interest is that the charge shall be reasonable as a whole."

Again, in *Crown Willamette Paper Co.* v. *Southern Pac. Co.*, 218 I.C.C. 279, 281:

> Evidence relating to one factor of a through rate does not prove by itself the unreasonableness of the through rate. The shipper's only interest is that the charge shall be reasonable as a whole. [Citing *Great Northern Ry. Co.* case, *supra.*]

The rail carriers in the instant case merely compared the applicable assailed combination through rate with rates on the same commodities from East Alburgh and Newport, Vt., to other points in the South in support of their position (R. 71).

this Court reversed the lower court which had found that the rail carriers had a published rate on the commodities from the international boundary which had not been declared to be unreasonable by the Commission. Nevertheless this Court held that this was no defense where the only applicable rate consisted of the joint through rate on the through shipments. Thus, this Court held (p. 663):

> The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers *local transportation* only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not apply to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that if any tariff covering that part of the through service existed, defendant would have produced it and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that

a rate therefor had been established as required by the Act. It follows that the lower court erred in distinguishing this case from the *News Syndicate Co. v. New York Cent. R. Co., supra.* That case controls this one.

To the extent that this Court in the *Lewis-Simas* case, *supra,* held the rail carriers to the applicable rate on the through shipment, it is the controlling precedent here. See also *News Syndicate Co. v. N.Y.C. R.R.*, 275 U.S. 179, 187. Here it must be emphasized that no rate was applicable from the international boundary. In fact, no rate of any kind was even published from the international boundary that had any application to this traffic. This is abundantly clear from the fact that the rail carriers actually collected charges based on the combination through rate made over interior points within the United States.

The report of the examiner on further hearing (R. 177) clearly stated the rule when he found (R. 191-192) that:

> The defendants err, therefore, when they contend that their rates southbound from Newport and East Alburgh are in fact rates applicable from the border. The Commission has jurisdiction to determination [sic] the lawfulness of combination rates based upon a point within the United States, to the extent that the total transportation takes place within the United States. * * * The complainants are entitled to just, reasonable, and otherwise lawful rates applicable to transportation within the United States, and *they are likewise entitled to*

> *assail the lawfulness of the actual rates available to them for all of such transportation, rather than, as contended by the defendants, only the factors applicable from East Alburgh and Newport.* [Emphasis supplied.]

Pursuant to the clear and unequivocal mandate of the provisions of section 1(1) (a) and (2) of the Act, 49 U.S.C. 1(1) (a) and (2), the Commission's jurisdiction extends to the "transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States." The Commission held (R. 75) that:

> * * * *We have jurisdiction over the rail carriers to the extent that they operate within the United States regardless of the manner of rate publication.* [Emphasis supplied.]

It further defined its jurisdiction by stating that (R. 72–73):

> Under the Interstate Commerce Act, our jurisdiction extends to this transportation only to the extent that it takes place within the United States. It is well settled that the rail carriers within the United States have a clear [fol. 87] alternative with respect to their participating in international traffic. They may publish rates to or from the international boundary, in which event they are answerable only for those rates, or they may participate in international rates to or from points in Canada and thus become jointly and severally liable for any unlawfulness in such rates. *News Syndicate Co.* v. *New York Central R. Co.*, 275 U.S.

179; *Buckerfield's* v. *Atchison, T. & S.F. Ry. Co.*, 280 I.C.C. 15. *We have no jurisdiction to prescribe international rates for application partly within Canada, as sought by the complainants.* [Emphasis supplied.]

In the instant case, the rail carriers had no rate in effect applicable to this through traffic from the international boundary to the southern receivers. If such a rate was in existence, and none was alleged by them, it would have been their duty to produce it. "The burden was upon the carrier[s] to bring forward evidence that a rate therefor had been established as required by the Act." *Lewis-Simas* case (p. 663). The only applicable rate in effect and the only one upon which the charges were based is the combination through rate made over the interior points in the United States, namely East Alburgh and Newport, Vt. Since the rail carriers were unable to produce an applicable rate on this through traffic from the international boundary, they attempted to move the international boundary down to the rate break points, thereby creating the fiction that Newport and East Alburgh were points on the international boundary.

However, the Commission in considering this contention of the rail carriers expressly found (R. 73) that the rate break points

> * * * *Newport and East Alburgh are about 5 and 3 miles, respectively, south of the international boundary, and the proportional rates maintained by the Canadian lines to these points obligate those carriers to provide substantial transportation service within the*

> *United States.* The act makes no distinction between domestic and foreign carriers in this respect. It applies to all common carriers by railroad to the extent that such transportation takes place within the United States. [Emphasis supplied.]

The Commission admitted (R. 73):

> While it is true, as stated by the defendants, *that in some instances this Commission, or divisions thereof, have considered points such as Rouses Point, 0.5 mile from the boundary, as border points on traffic to or from Canada, most of the cases have clearly indicated that our jurisdiction extends to or from the international boundary* * * * [Emphasis supplied.]

In that connection, the Commission cited several cases in which it held that its jurisdiction extended over transportation from and to the international boundary.

The District Court attempted to distinguish these cases on the ground that the cited Commission cases involved "joint rates over which the Commission's jurisdiction is conceded" (R. 250). But this is completely beside the point, since the District Court was simply confusing the secondary question of *liability* for the establishment and maintenance of unlawful rates, with the primary issue of *jurisdiction* over transportation. So far as the Commission's jurisdiction is concerned, it is immaterial whether one carrier, as in this case, or more than one carrier participates in the transportation of the through traffic from origins in Canada across the international

boundary to the rate break-interchange point *within the United States.* The Commission's jurisdiction attaches by virtue of the fact that the traffic moves to the rate break points either under a single rate over the line of a single carrier, as here, or under a *joint* rate applicable over the lines of two or more carriers. Certainly no one would seriously challenge the Commission's jurisdiction if the rate break point were 50 or 100 miles south of the border, or even 500 to 600 miles to Richmond, Va., as was established in *Durham Herald Co., Inc.* v. *Canadian Pacific Ry. Co.*, 280 I.C.C. 534.

Perceptive reading of the Commission's decision will indicate that the cited cases (R. 73–74) were intended to support only the proposition that the Commission had jurisdiction over transportation to and from the international boundary. The District Court conceded that (R. 252–253):

> * * * If, for example, the Canadian carriers sought to abandon service between the interchange points and the border, or if they sought to lease their trackage in the United States to another carrier, the Commission clearly would have jurisdiction. * * *

Nevertheless the District Court concluded that with respect to the rates assailed by the complainants, the Commission had no jurisdiction. (R. 253). In the face of express findings of the Commission to the contrary, the District Court merely concluded that (R. 249):

> * * * the fact that interchange occurs a few miles on one side of the boundary as opposed

> to a few miles on the other side, is a fortuitous event, an event upon which Congress could hardly have intended the Commission's jurisdiction to hinge. * * *

We submit that such a doctrine of *de minimis* is inconsistent with the basic jurisdictional definitions of sections 1(1)(a) and 1(2) of the Act and the District Court's concession regarding the Commission's jurisdiction under other sections of the Act (R. 252–253). By adopting the fiction, rejected by the Commission, that the rate break points should be considered as being on the international boundary, the District Court effectively cut off the complaining receivers' right of action to which they were entitled, i.e. "to assail the lawfulness of the *actual rates available to them for all of such transportation,* rather than, as contended by the defendants [rail carriers] only the factors applicable from East Alburgh and Newport" (Report of the Examiner on further hearing R. 192).

The extremely complex and highly technical rate situation in this case demonstrates that the Commission's decision in the instant case must be construed in the light of the record before it. Any inconsistency with other decisions by the Commission, as to whether a particular interchange point near the border should be considered as a border point for determining jurisdiction, does not constitute a basis for upsetting this order of the Commission on this record. As this Court pointed out in *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665–666:

> * * * This court has no concern with the correctness of the Commission's reasoning, with

> the soundness of its conclusion, or with the alleged inconsistency with findings made in other proceedings before it. [Emphasis supplied.]

The District Court was obviously impressed with the contention of the rail carriers made to the Commission (R. 75), "that it would not be practicable or feasible to interchange traffic at the international boundaries north of Newport and East Alburgh," because it concluded that the Commission "would not have reached a different result if the Canadian carriers had published a proportional rate from the points of origin to the border and an additional * * * proportional rate from the border * * * to the * * * points of interchange" (R. 248 ftn. 11). The Commission in its report simply held "but we do not perceive how this would affect the situation" (R. 75). Regardless of the manner of publication, the rail carriers would have had to prove that such a rate existed, and that it was applicable to the through shipments covered by the complaints. As we pointed out above, the applicable rate here is the assailed combination through rate made over interior points within the United States. The fact that it is a through route to which a through rate applied is incontestable. *Thompson* v. *United States,* 343 U.S. 549, 557; *United States* v. *Great Northern R. Co.,* 343 U.S. 562, 572–573; *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 666. See also *Kansas City So. Ry.* v. *Albers Comm. Co.,* 223 U.S. 573, 597–598, where this Court held:

> * * * By failing to establish or concur in a joint through rate for traffic accepted for interstate transportation, each participating carrier impliedly asserts that the rate which it has duly established, published, and filed for its own line shall be a component part of the through rate to be charged. * * *

The rail carriers did not choose to question the evidentiary findings made by the Commission to support its conclusions that the assailed through combination rates were unjust and unreasonable [22] for the past under section 1(4) of the Act. Therefore, the only issue presented on this phase of the appeal is whether the Commission possessed jurisdiction under section 1(4) of the Act to determine the lawfulness of the assailed combination through rates made over interior points within the United States applicable on the through traffic from origin points in Canada to points in the South.

It is clear from what we have said above that the Commission does possess such jurisdiction. It then follows as a corollary that under the provisions of section 1(5) of the Act unjust and unreasonable rates on this traffic are "prohibited and declared to

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[22] The District Court pointed out that (R. 244–245):

> * * * plaintiffs here do not argue that the Commission's findings as to the unreasonableness and prejudicial character of the Quebec-Carolina rates were without substantial evidentiary basis if these rates are to be viewed as an indivisible entity. *Plaintiffs' argument* before this court is confined to the contention *that the Commission exceeded* [fol. 291] *its power in failing to limit its jurisdiction to the local rate factor from the points of border interchange in Vermont southward to the Carolinas.* [Emphasis supplied.]

be unlawful," and pursuant to section 16(1) of the Act, 49 U.S.C. section 16(1), the Commission is authorized to award damages to the affected complainants.

The finding of the Commission in this respect is applicable to all of the rail carriers which participated in the transportation within the United States, and its effectiveness in the matter of affording relief for damages is no different than if the transportation had been entirely domestic. Lack of control over the foreign portion of the haul is of no legal significance where the rail carriers participate in through routes and either (1) joint through rates or (2) through combination rates based on points within the United States:[23] *Virginian Ry.* v. *United States,* 272 U.S. 658, 665; *Ayrshire Corp.* v. *United States,* 335 U.S. 573, 594; *New York* v. *United States,* 331 U.S. 284. In this respect, liability attaches regardless of the method of rate publication, i.e., a single factor joint rate, *Great Northern Ry. Co.* v. *Sullivan,* 294 U.S. 458; *Lewis-Simas-Jones Co.* v. *Southern Pacific Co.,* 283 U.S. 654; *News Syndicate Co.* v. *N.Y.C. R.R. Co.,* 275 U.S. 179; *Louisville and Nashville R. Co.* v. *Sloss-Sheffield Co.,* 269 U.S. 217, or a combination through rate *Atlantic & Y. Ry. Co.* v. *Carolina Button*

[23] The District Court gave as its second reason for reversing the Commission (R. 249):

> * * * if the Commission's action in the present case were approved by us it would follow that in situations where the foreign factor is the unreasonable factor American carriers will be held liable for a portion of overcharges that they had no part in formulating.

Corp., 74 F. 2d 870; *Atlantic Coast Line R. Co.* v. *Smith Bros.* 63 F. 2d 747, cert. denied 289 U.S. 761.

In the latter case (*Atlantic Coast Line R. Co.* case) no joint through rate was available to the complaining shipper on shipments to Florida. Instead the shipments moved on a combination through rate made up of several different class rates. Smith Bros., the complaining shipper, challenged the lawfulness of the entire combination through rate and obtained an award of reparations for the overcharges against all of the participating rail carriers. The initial and connecting carriers attempted to absolve themselves from liability by alleging (p. 747) "that the overcharge was not their act, but the act of the terminal carrier which had collected the freight [sic], and since they neither published nor exacted the improper rate they cannot be held liable." The Texas & Pacific Ry. Co. offered to prove (p. 748) that "it got only the rate that it would have been entitled to under the tariff."

It was urged upon the court that the fact that the shipments moved on a combination through rate rather than a joint rate did not make all of the participating carriers (p. 747) "partners in responsibility, each for the acts of the others, but to make each responsible for what it unlawfully does." Consequently, they argued, that since they received only their lawfully published rate, the terminal carrier which had collected more than the amount found to be just and reasonable by the Commission should alone be required to pay the reparations.

These contentions did not impress the Court of Appeals. It held that there was no evidence in the record (p. 748) "that the terminal carriers in collecting the through rate, acted on their own initiative, or collected more or other than the rate consented to by the initial and intermediate carriers." [24]

The opinion of the Court of Appeals goes on to point out (p. 748) that unlike other cases where the Commission expressly has found that the fault lay entirely with a specific carrier, in the case before it, the Commission had found the entire combination through rate unlawful and that "all the carriers had participated in the injustice." Under these circumstances, the court held (p. 748) that:

> It is the settled rule of the Commission that, "if a through rate, joint or combination, is found unreasonable and reparation is awarded the order entered runs against the carriers, collectively, that participated in the transportation." Pinson Brokerage Co. v. C. & G. R.R. Co., 89 I.C.C. 126; Hansen-Peterson Co. v. A., T. & S.F.R. Co., 113 I.C.C. 575; Illinois Powder Co. v. Chicago, P. & St. L.R. Co., 165 I.C.C. 127. This rule has the approval of the courts. Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 46 S. Ct. 73, 70 L. Ed. 242; News Syndicate Co. v. N.Y. Central R. Co., 275 U.S. 187, 48 S. Ct. 39, 72 L. Ed. 225; Lewis-Simas-Jones Co. v. So. Pac. Co., 283 U.S. 654, 51 S. Ct. 592, 75 L. Ed. 1333;

[24] In the instant case before the court, the record does not indicate otherwise.

Kanawha Black Band Coal Co. v. Chesapeake & O.R. Co., 107 W. Va. 469, 148 S.E. 855.[25]

In *Atlantic & Y. Ry. Co.* v. *Carolina Button Corp.*, 74 F. 2d 870, Judge Parker was confronted with an allegation similar to that urged upon the court in the *Atlantic Coast Line R. Co.* case, *supra*. It was contended that since the shipments were made on a combination through rate, whose factors consisted of separately established local rates rather than a joint through rate, that the participating rail carriers could not be held jointly and severally liable. The carriers admitted that a joint rate would have been collected and distributed among them in the same way as was the combination through rate. The mere fact that in one instance there may exist an express contract between the rail carriers participating in the through movement rather than an implied agreement was considered by Judge Parker to be a difference with no legal distinction, for as he held (pp. 873–874):

> * * * Where an unreasonable joint through rate is filed, there is an express agreement between the participating carriers to do that which the Commerce Act condemns; where the unreasonable through rate is made up by com-

[25] See also *Riverside Mills* v. *Augusta & Savannah Steamboat Company*, 40 I.C.C. 501, 502 (1916); *Alabama Grocery Company of Huntsville, Ala.* v. *Atchison, Topeka & Santa Fe Railway Company*, 197 I.C.C. 726, 728 (1933) on further hearing 206 I.C.C. 559, 561 (1935). In *Atlantic Lumber Co.* v. *Louisville & N.R. Co.*, 157 I.C.C. 236 (1929), the Commission awarded reparations against carriers engaged in transportation within the United States on shipments moving on a combination through rate from points in the United States to Canada, such combination having been made over Cincinnati, Ohio.

> bination of locals, such agreement is necessarily implied. The participation is the same in the one case as in the other; and we see no reason for a difference with respect to the liability of the participants.

Although the District Court, in the instant case, censured the Commission's decision for failing to apportion its finding of unlawfulness between the domestic and the Canadian transportation (R. 248), Judge Parker in the *Carolina Button Corp.* case did not find an equivalent situation insuperable. He held (p. 872) that:

> * * * Certainly, there is no reason why the failure of the Commission to direct the apportionment among the carriers of the through rate, which it prescribes as reasonable, should be held to invalidate its action in establishing such rate or in *condemning a prior through combination rate as unreasonable.*[26]

Thereafter, Judge Parker spelled out the underlying principle for holding liable in damages all the participating rail carriers in an unlawful combination through rate. He held (pp. 872–873):

> And we think it equally clear that, where a combination through rate is declared unreason-

[26] It has been the Commission's policy for many years in cases of this type not to apportion damages between the participating rail carriers. The order is for a gross sum and runs against all of the carriers. If the carriers are unable to agree to an apportionment amongst themselves, they can apply to the Commission for a determination of the matter. *Riverside Mills* v. *Augusta & Savannah Steamboat Company*, 40 I.C.C. 501, 502 (1916). A contrary policy would impose a impractical and insurmountable burden on the shipper to institute a multitude of suits for enforcement of the Commission's order in many jurisdictions.

able by the Commission, damages may be awarded for the exaction of the rate against all of the carriers who have participated therein. Because of the duty of the carriers to establish through routes and just and reasonable rates and charges, *the exaction of an unreasonable combination rate is a violation of the act, even though, as a result of their failure to promulgate reasonable joint through rates, such combination rate may be the only rate lawfully applicable to the shipment. For such violation the carriers are liable in damages; and we think that all who have participated in the through rate are jointly and severally liable, just as in the case of any other joint tort. It is true that in such case they have not participated in the publication of an unreasonable joint rate in violation of the act, as in the case of Louisville & N.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 46 S.Ct. 73, 70 L.Ed. 242; but they have participated in what is the real wrong in violation of the act, i.e. they have participated in charging and have shared in the division of the rate held by the Commission to be unreasonable.* Lewis-Simas-Jones Co. v. Southern Pacific Co., 283 U.S. 654, 660, 51 S.Ct. 592, 75 L.Ed. 1333. Section 8 of the Interstate Commerce Act, 49 U.S.C.A. § 8, would seem to settle the liability of all of the participating carriers in such case. * * * [Emphasis supplied.] [27]

To summarize, we submit that all of the railroads who participate in maintaining unjust and unreason-

[27] The provisions of section 8 of the Act, 49 U.S.C. 8 are set forth in the Appendix, *infra*, p. 49.

able combination rates are jointly liable to the shippers from whom charges based upon such rates were collected; that in the case of a combination rate upon international traffic, that liability exists under section 1 of the Interstate Commerce Act "to the extent that such transportation takes place within the United States;" that where the Canadian railroads perform line haul transportation service under their separately established rates to interchange points located three and five miles within the United States, the American railroads may not validly contend that only their separately established rates from the interchange points to the south are subject to the Act—and that the Commission is without authority to determine the reasonableness of the entire combination rate. Any other conclusion would remove a substantial amount of international traffic over important routes from effective rate regulation for the protection of American shippers.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed, with directions to dismiss the complaint.

Respectfully submitted.

ROBERT W. GINNANE,
General Counsel,

H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

FEBRUARY 1961.

APPENDIX

STATUTES INVOLVED

Interstate Commerce Act, 49 U.S.C. 1 et seq.:

Section 1 (1)(a) and (2) (49 U.S.C. § 1 (1)(a) and (2)).

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment;

—from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States.

(2) The provisions of this part shall also apply to such transportation of passengers and property, but only in so far as such transportation takes place within the United States,

Section 1(4) (49 U.S.C. § 1(4)).

(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such

carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 1(5) (49 U.S.C. § 1(5)).

(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 3(1) (49 U.S.C. § 3(1)).

(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory or any particular description of traffic in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage

in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 6(1) (49 U.S.C. § 6(1)).

(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such

form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

Section 6(7) (49 U.S.C. § 6(7)).

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8 (49 U.S.C. § 8).

That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery,

which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 16(1) (49 U.S.C. § 16(1)).

(1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

Section 16(2) (49 U.S.C. § 16(2)).

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

U.S. GOVERNMENT PRINTING OFFICE: 1941

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No. 266

Office-Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

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No. ——

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court is reported at 182 F. Supp. 516, and is set out in Appendix A to the jurisdictional statement filed by the Interstate Commerce Commission. The judgment of the district court is set forth in Appendix B to that jurisdictional statement. The report of the Commission is reported at 303 I.C.C. 743. This report, the Commission Order of May 7, 1958, and its further order of March 11, 1959, are set forth, respectively, as

Appendices C, D and E to the Commission's jurisdictional statement.

JURISDICTION

This suit was brought under 28 U.S.C. 1336 to set aside and enjoin enforcement of an order of the Commission. The judgment of the district court was entered on March 7, 1960, a timely motion for reconsideration was denied on March 26, 1960, and the United States filed its notice of appeal in the district court on May 24, 1960. The jurisdiction of this Court to review the district court's judgment by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *Public Service Commission* v. *United States*, 356 U.S. 421.

STATUTE INVOLVED

Section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)) provides as follows:

> It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage

in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

QUESTION PRESENTED

Whether the district court erred in failing to sustain the Interstate Commerce Commission's determination that the actions of rail carriers in maintaining certain joint rates on traffic moving from Canadian origins to points in official territory, while maintaining combination rates at a higher level for like service from the same Canadian origins to points in southern territory, were unduly prejudicial to consignees in southern territory and unduly preferential to consignees in official territory, in violation of Section 3(1) of the Interstate Commerce Act.

STATEMENT

The primary source of asbestos processed in the United States is in southern Quebec. Asbestos is processed in North and South Carolina (southern territory) and at various points in so-called official territory.[1] The Canadian carriers serving the asbestos mines participate in joint rates with American carriers to the processing plants in official territory, but there are no joint rates to the plants in southern territory. The combination rates on shipments to southern territory (consisting of a "proportional" rate

[1] Official territory, broadly speaking, lies east of the Mississippi River and north of the Ohio and Potomac Rivers.

between the Canadian origins and the ports of entry, some three to five miles inside the United States, and domestic "class" and "commodity" rates from the ports of entry to the Carolina destinations) are substantially higher than the joint rates to the centers for the processing of asbestos in official territory.

Thermoid Company, a North Carolina processor of asbestos, filed a complaint with the Interstate Commerce Commission alleging that the combination rates (*a*) were unreasonable under Section 1(4) of the Interstate Commerce Act, 49 U.S.C. 1(4), and (*b*) subjected it to undue prejudice within the meaning of Section 3(1) of the Act in relation to processors in official territory who receive the benefits of joint rates. After full proceedings, the Commission, on May 7, 1958, issued a report (Appendix C to the jurisdictional statement of the I.C.C.) which found the rates to be both unreasonable and unduly prejudicial. It ordered the carriers to file tariffs for shipments of asbestos to complainants' plants which would not exceed the tariffs to official territory by more than a specified amount. On reconsideration, the Commission, on March 11, 1959, issued an order (Appendix E) clarifying the Commission's intent to leave to the option of the rail carriers the method of adjusting the rates so as to remove the discriminations found to violate Section 3 of the Act.

In proceedings instituted before a three-judge court, the district court held that the Commission had no authority to find the combination rates unreasonable because they included a foreign factor not subject to its jurisdiction. The court did not discuss the Commission's finding as to undue prejudice.

The issue as to undue prejudice was stressed in a motion for reconsideration. The court denied the motion without opinion on March 26, 1960.

THE QUESTION IS SUBSTANTIAL

The district court stated its view of the issue in this case as follows:

> A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States.

This question, which the district court resolved adversely to the Commission, may be relevant in judging the validity of the Commission's finding that the rates in issue were unreasonable. It is clearly not involved, however, in determining the propriety of the Commission's order to eliminate the unduly prejudicial relationship of the rates.

When carriers or groups of carriers enter into joint rates for the transportation of goods from a common originating point to certain destination points, but fail to provide joint rates to other destinations, to the prejudice of the latter, it is well settled that the Commission has authority under Section 3 of the Act to order such discrimination ended, even where the particular rates involved are not in themselves unreasonable. *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627; *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136, 145; *United States* v. *Illinois Central Ry. Co.*, 263 U.S. 515, 520; *Virginian*

Ry. v. *United States*, 272 U.S. 658; *New York* v. *United States*, 331 U.S. 284, 342-344. Where, as here, the entry into joint rates depends upon the participation of a foreign (Canadian) carrier, the Commission may not be in a position to prescribe joint rates under Section 15 of the Act. But it has not purported to do so. Instead, as its Supplemental Order of March 11, 1959 (Appendix E) makes clear, the Commission gave the carriers operating in the United States—carriers whose active cooperation in the joint rates to official territory brings about the discrimination—the alternative of eliminating the prejudice by lowering the rates to southern territory or raising them to official territory. See *St. Louis S. W. Ry. Co.* v. *United States*, *supra*, 245 U.S. at 145; *Texas & Pacific Ry. Co.* v. *United States*, *supra*, 289 U.S. at 650.[2]

The problem is of substantial importance to the Commission's regulation of railroad rates in the interests of shippers and areas of this country. For, if the district court's decision stands, the right of shippers, communities, and entire regions to be free from discrimination and undue prejudice in transportation of all types of goods originating or

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[2] It is notable that the predominant part of the through journey from the Canadian origins to the various American destinations takes place within the United States. The carriers operating in the United States are thus the principal participants in both rates (the joint rates to official territory and the combination rates to southern territory). Since these carriers are "the common source of the discrimination", an "order for correction of the disparity" may "run against * * * them." *Texas & Pacific Ry. Co.* case, *supra*, 289 U.S. at 650. And see *New York* v. *United States*, 331 U.S. 284, 340 *et seq.*

terminating in foreign countries will be beyond the reach of Commission control. This would be true even in situations, such as here, where the discrimination results from the voluntary participation of American carriers in joint rates giving preference to one area at the expense of other areas. Since the correction of this discrimination is not dependent upon the Commission's exercise of jurisdiction over the rates between the foreign origins and the ports of entry into the United States, the district court's opinion, which rests solely upon the proposition that the Commission lacks jurisdiction over such rates, does not support its judgment.

CONCLUSION

This appeal raises a significant question of law which is unquestionably important in its bearing upon the Commission's power to achieve an equitable railroad rate structure throughout the United States. It is respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,
Solicitor General.

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JULY, 1960

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UNITED STATES OF AMERICA, APPELLANT

v.

CENTRAL VERMONT RAILWAY, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE UNITED STATES

ARCHIBALD COX,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 241–253) is reported at 182 F. Supp. 516.

JURISDICTION

The judgment of the district court was entered on March 7, 1960 (R. 241–253), and a timely motion for reconsideration was denied on March 26, 1960 (R. 261). The United States filed notice of appeal on May 24, 1960 (R. 267), and this Court noted probable jurisdiction of the appeal (and of the appeals in Nos. 257 and 258) on October 17, 1960 (R. 272). 364 U.S. 861. The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Appellee railroads maintain joint rates for transporting asbestos from Canadian origins to points in Official Territory. These rates are lower, distance considered, than the combination rates (consisting of the Canadian carriers' proportional rates to interchange points near the international boundary plus the American carriers' local or class rates from such interchange points to the south) applicable to transportation from the same Canadian origins to points in Southern Territory. The Commission found that the foregoing rate disparity was unduly prejudicial to processors of asbestos in Southern Territory and unduly preferential of their Official Territory competitors, in violation of § 3(1) of the Interstate Commerce Act, and it entered an order requiring the appellees, "according as they participate in the transportation within the United States," to remove such undue prejudice and preference.

The question is whether the Commission had jurisdiction to enter this order.

STATUTE INVOLVED

Section 3(1) of the Interstate Commerce Act (49 U.S.C. 3(1)) provides as follows:

> It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular

description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

STATEMENT

The primary source of asbestos processed in the United States is in southern Quebec (R. 63), some 100 miles north of the United States-Canadian border. Asbestos is processed both in North and South Carolina (located in Southern Territory) and at various points in Official Territory (R. 62, 66).[1] The appellee carriers, including the two Canadian carriers serving the asbestos mines, maintain joint through rates for transportation from the mines to destinations in Official Territory, but have established no joint through rates to southern destinations, and Carolina plants have to pay charges based on combination rates (R. 64). These combination rates consist of the Canadian carriers' proportional rates[2] from the mines to two ports of entry in Vermont, some three to five miles inside the United States, plus the domestic carriers'

[1] Official Territory, broadly speaking, lies east of the Mississippi River and north of the Ohio and Potomac Rivers. *Class Rate Investigation, 1939*, 262 I.C.C. 447, 457.

[2] The proportional rates are restricted to traffic destined to points in the United States (R. 64, 65).

class or commodity rates from these ports of entry to Carolina destinations (*ibid.*). The combination rates to these destinations are substantially higher, distance considered, than the joint rates applicable to numerous destinations in Official Territory (R. 75–76, 79).

Thermoid Company,[2] a North Carolina processor of asbestos, filed a complaint with the Commission alleging that the rates charged it on transportation from the Canadian mines were unjust and unreasonable, in violation of § 1(4) of the Interstate Commerce Act, and were, in relation to the rates which the railroads charged the complainant's competitors in Official Territory, unduly prejudicial, in violation of § 3(1) of the Act (R. 18–24). Division 3 of the Commission ruled that, although the assailed rates had not been shown to be unreasonable, they were unduly prejudicial and unlawful under § 3(1). It held further that damages caused by this undue prejudice had not been shown with sufficient particularity to warrant an award of reparation (R. 27–32).

The Commission reopened the proceeding upon the request of both the complainant and the railroads, and consolidated it with four similar complaints filed by other Carolina processors of asbestos (R. 60, 62–63). In the ensuing proceedings, the full Commission ruled that the railroads had, by their concurrent maintenance of lower joint rates to Official Territory, subjected the Carolina complainants (appellants in No. 257) to undue prejudice and disadvantage in violation of § 3(1) of the Act (R. 75–78). It further

[2] H. K. Porter Company, Inc., one of the appellants in No. 257, is successor in interest to Thermoid Company (R. 262).

found that rates from the Canadian mines to the four Carolina cities where the complainants are located (Charlotte, Davidson and Marshville, North Carolina, and North Charleston, South Carolina) are and will be unduly prejudicial to the extent that they exceed by specified amounts the rates from the same origins to Ambler, Pennsylvania, in Official Territory (R. 77). The Commission accordingly entered an order on May 7, 1958, which, after reciting findings of undue prejudice, directed the defendants (the present appellees) to "cease and desist * * * from practicing the undue prejudice and preference" which it had found, and to establish rates "which will prevent and avoid [said] undue prejudice and preference" (R. 80–81).

The Commission also found that the rates from the Canadian mines to the pertinent Carolina destinations were unjust and unreasonable to the extent that they exceeded certain specified amounts (R. 76–77), and that the complainants are entitled to reparations in the amount of the difference between the charges collected and those which the Commission found to be reasonable (R. 78). No order was entered with respect to unreasonable rates (R. 81), but the complainants were advised in this connection to comply with Rule 1.100 of the Commission's General Rules of Practice (R. 78).[1]

[1] Rule 1.100 provides in part:

> When the Commission finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant should immediately prepare a statement showing details of the shipments on which damages are claimed, in accordance with the form No. 5.
> * * *

On appellees' suit to set aside the Commission's "undue prejudice" order, the district court held the order invalid (R. 253). The court apparently concluded that the validity of the order depended upon whether the Commission had jurisdiction to regulate all factors of the combination rate charged for transportation from Canadian origins to Carolina destinations (R. 242, 248–249). Under this test of validity, it followed from the court's holding that the Commission was without jurisdiction to regulate the Canadian carriers' proportional rates from the points of origin to the border interchange points within the United States (R. 250, 252–253), that the order which the Commission had entered was beyond its jurisdiction.

SUMMARY ARGUMENT

Section 3(1) of the Interstate Commerce Act makes it unlawful for a railroad to subject any person to "any undue or unreasonable prejudice or disadvantage". A railroad violates this section if it participates in transportation under differing through rates, under similar transportation conditions, from a common origin to different destinations or from different origins to a common destination, and the rate disparity adversely affects any shipper or consignee. The section empowers the Commission to order a railroad so participating in a prejudicial rate disparity to cease and desist, irrespective of whether other carriers, not bound by the Commission's order, participate in the through transportation at disparate rates, provided the carriers which are bound by the order

can, by their own acts, terminate the undue prejudice caused by the rate disparity.

The disparity which the Commission here found to be prejudicial involves rates for through transportation from common Canadian origins to differing United States destinations. The Commission has jurisdiction only over transportation within the United States, but the Commission's undue prejudice order is directed only against railroads which "participate in the transportation within the United States". The order is valid and enforceable as against the American carriers which transport under the disparate through rates wholly within the United States, because these railroads both participate in the prejudicial higher and lower through rates and have it within their power to terminate the resulting undue prejudice.

The Commission has jurisdiction to determine the effect and character of rates covering through carriage from points outside the United States as an incident to its enforcement of the commands of the statute with respect to transportation services rendered within the United States as a part of such through carriage. This principle, established by *News Syndicate Co. v. New York Central R.R.*, 275 U.S. 179, as to the reasonableness of rates for through transportation from a point outside the United States is equally applicable to undue prejudice arising from differing rates for through transportation from a place beyond the country's border. *Cyanamid and Crude Cyanide From Niagara Falls, Ontario*, 155 I.C.C. 488; *Mayo Shell Corp.* v. *Baltimore & Ohio R.R.*, 297

I.C.C. 133. The Commission, in making such factual determination, is not thereby regulating or exercising control over transportation outside the United States. It follows that the Commission acted within its jurisdiction in entering the undue preference order which the court below set aside.

ARGUMENT

THE COMMISSION HAD JURISDICTION TO ENTER ITS ORDER REQUIRING TERMINATION OF THE UNDUE PREJUDICE CAUSED BY MAINTENANCE OF JOINT THROUGH RATES FOR TRANSPORTATION FROM CANADIAN ORIGINS TO OFFICIAL TERRITORY DESTINATIONS, LOWER THAN THE THROUGH COMBINATION RATES APPLICABLE TO TRANSPORTATION FROM THE SAME ORIGINS TO SOUTHERN TERRITORY DESTINATIONS

The district court stated at the outset of its opinion what it believed to be the controlling issue in the case. It said (R. 242):

> A single question is presented to this court: Does the Commission have jurisdiction over the foreign factor of a combination international rate when the foreign factor is a proportional rate from the points of origin to a border interchange within the United States?

The district court determined this question in the negative. The Government's position is that, without regard to the correctness of this determination, the Commission acted within its jurisdiction in directing the railroads operating in the United States, parties to joint rates from Canadian origins to Official Territory destinations and concurrently participating in higher through combination rates governing trans-

portation from these origins to Southern Territory destinations, to put an end to the undue prejudice and preference caused by this rate disparity.

The Commission's jurisdiction over the foreign factor (the Canadian railroads' proportional rates to the Vermont interchange points) of the through combination rates established for transportation to Southern Territory destinations may be relevant to the validity of the Commission's finding that the through combination rates were unreasonable. But insofar as the district court ruled on the validity of this finding, its ruling does not directly or indirectly affect the validity of the Commission's undue preference order. We believe, moreover, that the finding that the through combination rates were unreasonable, and the related finding (R. 78) that the Carolina manufacturers are entitled to reparations (see *supra*, p. 5), were not in issue before the district court.[5]

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[5] The order under review did not prohibit the railroads from charging for transportation from Canadian origins to Southern Territory, rates in excess of those which the Commission found to be reasonable for such transportation (R. 81). The order, by its explicit terms, prohibited only the undue prejudice and preference found to result from the disparity between rates to Official Territory and those to Southern Territory (*ibid.*).

The finding that the Carolina manufacturers are entitled to reparations does not, in our view, constitute a reviewable order, the Commission having refrained from entering any order pending a determination of the amounts involved. If an order is entered and the carriers thereafter fail to comply with it, the *shippers* will have a right to initiate suit in the courts pursuant to Section 16(2) of the Interstate Commerce Act. Such a suit, if filed in the federal courts, is to be heard by a single-judge district court, with right of appeal to the court of appeals. *United States* v. *I.C.C.*, 337 U.S. 426, 442–443; *Pennsylvania R. Co.* v. *United States*, 363 U.S. 202, 205–206. The three-judge district

The Commission's power to determine that certain Carolina manufacturers were subjected to undue prejudice by the higher level of rates applicable to the transportation of asbestos from Canadian origins to Southern Territory than to Official Territory, and to order removal of this undue prejudice, does not depend upon the Commission's power to determine that the through combination rates governing transportation to Southern Territory were unreasonable. "Proceedings [under § 3(1)] to remove unjust discrimination are aimed directly only at the relation of rates." *United States* v. *Illinois Central Railroad,* 263 U.S. 515, 520. Both the higher rate and the lower rate "may lie within the zone of reasonableness and yet result in undue prejudice." *Id.* at 524. "Orders to remove discrimination, as commonly framed, do not fix rates. They merely determine the relation of rates, by prohibiting the carrier from charging more for carriage to one locality than under similar conditions to another; * * *." *St. Louis Southwestern Railway* v. *United States,* 245 U.S. 136, 145.

Nor was the Commission's power to issue its undue prejudice order dependent upon its jurisdiction over (or power to enter an order against) the two Canadian railroads (Canadian National Railway Company and Quebec Central Railway Company) which transport asbestos from the Canadian mines to the Ver-

court which heard the instant suit instituted by the *carriers* did not purport to adjudicate the question of the carriers' liability for reparations (see R. 244), and it would appear that the court's expression of views which bear on that question would not be binding in the event of future litigation.

mont "interchange" points where delivery is made to railroads serving Official Territory and Southern Territory destinations. When connecting carriers furnish through transportation, and the rates are higher for transportation to certain destinations than to others, or higher from certain origins than from others, resulting in undue prejudice to particular shippers or consignees, the Commission's power to require termination of the undue prejudice is not dependent upon its power to reach by its order all carriers participating in transportation at the disparate rates. It is sufficient that the undue prejudice order runs against carriers who participate in transportation at the higher and the lower rates and who themselves are in a position to stop this rate disparity.

In *Illinois Central, supra,* the Illinois Central and various connecting independent railroads had established the same through rates, regardless of distance, for transporting to northern markets lumber shipped from mills in an area in Alabama and Mississippi known as blanket territory. However, a higher rate had been established for lumber shipped from a mill, within blanket territory, located on the Fernwood & Gulf (Fernwood), an independent short line connecting with the Illinois Central. The Commission found that the higher rate subjected this mill to undue prejudice and ordered discontinuance of the discrimination. The Illinois Centrol attacked the validity of the order as applied to it, upon the ground that the mill paying the higher rate "is not on its own lines and it is not in a position to remove, by its own act, the dis-

crimination complained of" (263 U.S. at 520).* This Court rejected the contention upon the basis that the Illinois Central, "acting alone, is in a position to" remove the prejudicial rate disparity (*id.* at 521). The Court thus ruled that a carrier participating in the higher and the lower rate causing undue prejudice may be validly ordered to cease and desist if it lies within the carrier's own power to bring the prejudicial rate disparity to an end, irrespective of whether the other carriers participating in the discriminatory rates are bound by the Commission's order.

The *Illinois Central* decision also establishes that § 3(1) applies to prejudice resulting from disparate rates whether they be through joint rates or through combination rates. Some of the through rates from blanket territory were combination rather than joint rates. The Court, holding this circumstance immaterial, stated (263 U.S. at 527):

> Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

Asbestos moving from the Vermont interchange points to Carolina destinations has to pass through Official Territory. Accordingly, substantially all of the railroads participating in this transportation (under through combination rates) also participate in the transportation of asbestos (under joint through rates) from the interchange points to Official Terri-

* The validity of the order as applied to the Fernwood was attacked upon other grounds (*ibid.*).

tory destinations, such as Ambler, Pennsylvania, and Baltimore, Maryland. American carriers against which the Commission's order is directed therefore participate in both the higher and the lower rates whose relationship was found to be unduly prejudicial to Carolina asbestos manufacturers.

These railroads, furthermore, are in a position to terminate this undue prejudice by their own acts. One method by which they may terminate the existing prejudicial rate disparity is by withdrawing their concurrence in the joint rates established for transportation from Canadian origins to Official Territory destinations. Upon termination of these joint rates, the rates applicable to this transportation would be a combination of the Canadian carriers' proportional rates to the interchange points and local or class rates therefrom; the rates to Official Territory would then be on the same basis as the present combination rates governing transportation from Canadian origins to Carolina destinations. But this is not the only method of terminating the existing prejudicial rate disparity available to the American carriers. Another alternative would be to publish proportional rates from the interchange points to Carolina destinations sufficiently low so that these rates, plus the Canadian carriers' proportional rates to interchange points, would meet the requirements of the Commission's report and order as to elimination of prejudicial rate disparity as between Official Territory destinations and Carolina destinations (see R. 77–78, 81).

The Commission was not deprived of jurisdiction by reason of the fact that it dealt with disparate

rates for through transportation from points in a foreign country to points in the United States. By express terms, the requirements of the statute embrace transportation from a foreign country to a place in the United States "insofar as such transportation [or transmission] takes place within the United States".[7]

The Commission's jurisdiction to enter its undue prejudice order involves, we think, two aspects. The first is the Commission's jurisdiction to determine whether differing through rates from a foreign origin to different United States destinations constitute such rate disparity as to be unduly prejudicial to certain consignees within the meaning of § 3(1) of the Act. The second is its jurisdiction, if it finds such prejudice, to order termination thereof.

As to the first jurisdictional question, railroads operating wholly within the United States are engaged in transportation under through rates which are higher to some destinations, distance considered, than to others. The Commission can determine whether the domestic transportation at these disparate through rates comes within the § 3(1) prohibition only by determining whether there is such rate disparity as to the rates charged for, and applicable to, through carriage (which includes transportation outside the United States). The Commission, in making this factual determination, is obviously not regulating or

[7] Section 1(1) of the Act, 49 U.S.C. 1(1), makes its provisions applicable to common carriers engaged in the transportation of property by railroad "from or to any place in the United States to or from a foreign country, but only insofar as such transportation or transmission takes place within the United States".

exercising control over the rates charged for the foreign part of the through transportation.

In an analogous situation, this Court held that the Commission has jurisdiction to determine the reasonableness of a rate jointly established by a Canadian carrier and an American carrier for carriage of goods from a point in Canada to a point in the United States, where it was necessary for the Commission to make this determination in order to decide whether an American consignee was entitled to recover reparations from the American carrier, which transported the goods from the international boundary under the joint through rate. *News Syndicate Co.* v. *New York Central R.R.*, 275 U.S. 179, 185–188. We submit that the principle which the case establishes is, that the Commission may, as an incident to its enforcement of the commands and prohibitions of the statute, pass upon the character or effect of rates charged for through transportation from a foreign country. We likewise submit that this principle is equally applicable whether the Commission is dealing, as in *News Syndicate*, with the requirements of §§ 1(4) and 1(5) of the Act or, as here, with those of § 3(1).

The foregoing observations are directly supported by *Cyanamid and Crude Cyanide From Niagara Falls, Ontario*, 155 I.C.C. 488, decided in 1929. A Canadian carrier and an American carrier filed joint rates superseding lower joint rates which they had previously established for transporting cyanamid and cyanide from a point in Canada to points

in the United States, and the full Commission (two Commissioners dissenting) ruled that it had jurisdiction to consider the lawfulness of the new joint rates. 155 I.C.C. at 489–493, 503. It stated that the effect of a contrary holding "would be to free from any regulation every joint international rate now participated in by the United States lines, and to render impotent our jurisdiction even over that portion of the transportation which 'takes place within the United States' ". *Id.* at 491. The Commission significantly added (*ibid.*): "And this would be true not alone as to the 'reasonableness' of such rates, which was the only question considered by the court [in *News Syndicate*], but to questions of undue prejudice and unjust discrimination as well."

In a concurring opinion Commissioner Eastman said that the Commission had in the past "asserted jurisdiction over the lawfulness of international rates under both sections 1 and 3" of the Act (*id.* at 500). He observed, with reference to § 3, that an international rate might be "relatively lower than corresponding rates within this country" to the injury of certain American shippers; and that establishment by the Commission of a lawful rate from the boundary would not displace the low joint international rate or abate the injury which it caused (*id.* at 501). He further said (*ibid.*):

> The only practicable remedy is an order requiring the United States railroad to cease and desist from participating in the objectionable international rate. Upon further consideration it seems to me that we must have

> jurisdiction to make such an order, for there is no other way of exercising effective control over that portion of the international transportation which takes place within the United States, of which we plainly have jurisdiction.

In *Mayo Shell Corp.* v. *Baltimore & Ohio R.R.*, 297 I.C.C. 133, the Commission ruled, in accordance with the view which it had declared in its *Cyanamid* ruling, that it is empowered to act against undue prejudice caused by disparate rates for through transportation furnished in part outside the United States. In *Mayo Shell,* rates on crushed or ground oyster shells to trunkline and New England destinations, and to 122 points in Canada, were higher from Houston, Texas, than from Morgan City, Louisiana, and were found to be unduly prejudicial to a Houston shipper of shells. The Commission's order required rates from Houston to be no higher than those from Morgan City, and made no exception of rates to Canadian destinations (297 I.C.C. at 135).[8]

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[8] While rates to Canadian destinations were thus covered by the order, its commands respecting such rates were confined to those charged by carriers operating within the United States, as to service rendered therein. The Commission said (*ibid.*):

> Portions of the transportation at the assailed rates occur in Canada, * * *. We have jurisdiction only over such of the transportation as takes place within the United States, and our order herein will be directed only against the defendant carriers engaged in such transportation.

The second aspect of the jurisdictional question before the Court—whether the Commission's order is valid and enforceable when limited, as provided in the order,* to rates charged by United States carriers for transportation within the United States—has already been considered (*supra*, pp. 10–13). We repeat that the order, as so limited, is valid and enforceable because (1) carriers operating wholly within the United States are parties to the higher and lower through rates found to be unduly prejudical and (2) these carriers have it within their power to put an end to this undue prejudice without consent or other action by carriers operating outside the United States (*supra*, pp. 12–13).

CONCLUSION

It is respectfully submitted that the Commission acted within its jurisdiction in entering its undue preference order, and that the judgment below should be reversed with directions to dismiss the complaint.

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Attorney.

FEBRUARY 1961.

*The order runs against the defendant railroads named in the complaints, "according as they participate in the transportation within the United States" (R. 81).

U. S. GOVERNMENT PRINTING OFFICE 1961

SUPREME COURT OF THE UNITED STATES

Nos. 257, 258 AND 266.—OCTOBER TERM, 1960.

H. K. Porter Co., Inc., et al., Appellants, 257 *v.* Central Vermont Railway, Inc., et al.	On Appeals From the United States District Court for the District of Vermont.
Interstate Commerce Commission, Appellant, 258 *v.* Central Vermont Railway, Inc., et al.	
United States, Appellant, 266 *v.* Central Vermont Railway, Inc., et al.	

[May 22, 1961.]

MR. JUSTICE BLACK delivered the opinion of the Court.

The Interstate Commerce Act confers broad powers upon the Interstate Commerce Commission to regulate railroad transportation in the United States or to or from a foreign country, "but only insofar as such transportation . . . takes place within the United States."[1] In this case, here on appeal under 28 U. S. C. §§ 1253 and 2101 (b), a three-judge District Court set aside a Commission order on the ground that the Commission was attempting to regulate railroad transportation in Canada in excess of the Commission's jurisdiction.[2]

[1] 49 U. S. C. § 1 (1) (a) and § 1 (2).

[2] 182 F. Supp. 516.

The Province of Quebec, Canada, is a principal source of asbestos for manufacturers of asbestos products in this country. It is transported by Canadian railroads through southern Canada to points in Vermont three to five miles south of the border and carried from there by the various appellee railroads to other points in the United States. Canadian and American carriers have joined in the publication of joint through rates available to consignees in "official territory" in the Northeastern States,[3] which rates are substantially lower than the combination of separate or local rates that are published and available as combination through rates for consignees in the Southern States. On the basis of these and other facts the Commission found after hearings that the higher combination rates to complainants in the South were: (a) "unjust and unreasonable" and therefore in violation of § 1 (5) of the Act;[4] and (b) "unduly prejudicial" to the southern consignees and "unduly preferential" to the northern consignees enjoying the lower joint rates, and therefore in violation of § 3 (1).[5] The Commission then entered its order directing the railroads to cease and desist from continuing to practice the undue prejudice and preference it had found and to establish, post and maintain rates and practices which would thereafter "prevent and avoid" such prejudice and preference.[6]

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[3] "Official territory" is in general that area of the United States lying east of the Mississippi River and north of the Potomac and Ohio Rivers. See Class Rate Investigation, 1939, 262 I. C. C. 447, 457.

[4] 49 U. S. C. § 1 (5).

[5] 49 U. S. C. § 3 (1).

[6] Since the challenged order prescribed no "reasonable rates" to be observed, we have no occasion to consider the contention that the Commission was without jurisdiction to prescribe such rates. Nor did the Commission enter any final order that a complainant is entitled to an award of damages because it had been charged unlawful rates. Such an order, when and if made, can be challenged before a

The District Court's holding that the Commission was without jurisdiction was based on its assumption that the Commission's order attempted to control the Canadian part of the transportation. But the order did not run against any transportation except that taking place "within the United States." The order directed the defendant railroads, "according as they participate in the transportation within the United States," to take action within their power to cease their participation in a transportation practice that the Commission had found to be prejudicial in violation of § 3 (1). The affected transportation within this country was that "from a foreign country" over which § 1 (1)(a) specifically gives the Commission jurisdiction, and the order did nothing more than direct railroads engaged in that transportation to adjust their transportation practices "within the United States" in such a way as to eliminate illegal discriminations. These railroads operating within the United States undoubtedly have complete power to stop these discriminations. Mere withdrawal by the American railroads from the preferential joint through-rate agreements would be an obvious way to do so, and an alternative method would be to lower the combination through rates to southern territory by reduction of the rates from the Vermont interchange points to the South.

It has long been settled that the Commission's power to forbid unlawful rate discriminations is in no way diminished because the rates are published as joint through rates or combination through rates.[7] This power likewise is not lost merely because the particular transportation by railroads carrying goods in this country happens to be a continuation of carriage from another country.

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single judge under 49 U. S. C. § 16 (2). See *United States* v. *I. C. C.*, 337 U. S. 426, 442–443; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 205.

[7] See *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 527.

Otherwise the Commission's mandate to protect shippers against all undue discriminations would be frustrated with respect to rates that in part include payment for transportation that takes place in a foreign country.[*]

It was error to set aside the Commission's order for lack of jurisdiction, and therefore the District Court's judgment is

Reversed.

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[*] Cf. Commissioner Eastman's concurring opinion in *Cyanamid and Crude Cyanide from Niagara Falls, Ontario*, 155 I. C. C. 488, 501–502.